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**THE RECEPTION OF FOREIGN PRIVATE LAW IN THAILAND IN
1925: A CASE STUDY OF SPECIFIC PERFORMANCE**

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ABSTRACT

This thesis explores the making of Thailand's Civil and Commercial Code in 1925 ('Code of 1925'), especially the drafting method the draftsmen employed, and ascertains how the use of this method affected Thai lawyers' understanding of rules and concepts of the Code.

The Code of 1925 emerged from a period in which Thailand was under threat from colonisation by Western powers. As a result of a number of unbalanced commercial treaties between the Thai and foreign governments, the jurisdictional sovereignty of the country had been eroded by consular jurisdiction and the principle of extraterritoriality. These 'unfair treaties' forced the Thai government to establish a modern legal system as part of its attempts to recover full judicial autonomy. The work of codification of civil and commercial law, which began in 1908 under the direction of French draftsmen, produced the desired result in 1925 only after Phraya Manavarajasevi (Plod na Songkhla) became involved. Plod was instrumental in replacing the French *Code civil* with the BGB of 1900 as the principal model and introducing the Japanese Civil Code of 1898 ('Minpō') and the 'copying method' which he referred to as the 'Japanese method' to the new Thai-dominated drafting committee. The Japanese Code and the 'Japanese method' were chosen owing to Plod's belief that the Japanese had established their civil code by copying the BGB.

This thesis shows that Alan Watson's theory of legal transplants is well suited for explaining this type of legal development: the draftsmen copied the wording of English translations of provisions of the BGB and the Minpō without much concern about their conceptual foundations. They finished their task within seven months. But Watson's contention that successful legal borrowing does not require 'a systematic knowledge of the law' must be approached with great caution. Plod was misled by a secondary source he consulted into believing that the Minpō was practically a copy of the BGB. In reality, the Japanese Code was influenced by a variety of foreign laws, including German and French law. The drafting committee's lack of knowledge about the rules and concepts they borrowed and the method they adopted led to difficulties in interpreting the rules and concepts in question. This is illustrated in this thesis by a case study of the legal rules in the Code of 1925 on specific performance.

Most of the Thai provisions concerning non-performance and remedies for non-performance were copied from the BGB, but two important rules concerning the rights to performance and damages (Articles 213 and 215) came from the Minpō. These provisions were mainly influenced by French law, but Plod and most likely other Thai draftsmen erroneously believed that they were of German origin. The text of these two articles clearly put specific performance and damages as remedies for non-performance on equal footing. The consequence of this is that Thai academics who maintain that specific performance is the primary remedy for non-performance have struggled to justify this point of view. Whenever they expound on the principle of the primacy of specific performance in Thai law, Thai writers produce contradictory statements because the wording of Articles 213 and 215 forces them to accept that the creditor in case of non-performance has the right to choose between specific performance and damages.

This thesis shows that legal borrowing without a proper use of comparative law and legal history and a systematic knowledge of the law borrowed can lead to undesirable results. Thai lawyers must employ comparative and historical methods when discovering the true character of the Thai rules and concepts. With the help of these methods, they may find common ground in legal concepts and resolve some theoretical problems.

DECLARATION

I, Munin Pongsapan, hereby declare that this thesis, which is approximately 98,869 words in length, has been composed by me, that it is a record of work carried out by me, and that no part of it has not been submitted in any previous application for a higher degree.

Signature

30 April 2013

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ABBREVIATIONS

AD	<i>Anno Domini</i>
AJCL	American Journal of Comparative Law
AJCL Supp	American Journal of Comparative Law Supplement
AJIL	American Journal of International Law
Am J Sociol	American Journal of Sociology
BC	Before Christ
BE	Buddhist Era as used in Thai literature
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code) of 1900
BIICL	British Institute for International and Comparative Law
BJLS	British Journal of Law and Society
Boston Coll LR	Boston College Law Review
BYU L Rev	Brigham Young Law Review
Cal LR	California Law Review
CJAL	Columbia Journal of Asian Law
CJLS	Canadian Journal of Law and Society
CLJ	Cambridge Law Journal
Col LR	Columbia Law Review
Columbia UP	Columbia University Press
CUP	Cambridge University Press
Dalhousie LJ	Dalhousie Law Journal
Doc No	Document Number
Edin LR	Edinburgh Law Review
ERPL	European Review of Private Law
EUP	Edinburgh University Press
EER	European Economic Review
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
HMSO	Her Majesty's Stationary Office
Hofstra L Rev	Hofstra Law Review
HUP	Harvard University Press
ICLQ	International and Comparative Law Quarterly
Int Soc Sci Bull	International Social Science Bulletin
IRLE	International Review of Law and Economics
J Asian Stud	Journal of Asian Studies
JCL	Journal of Comparative Law
JCLIL	Journal of Comparative Legislation and International Law
JIAEA	Journal of the Indian Archipelago and Eastern Asia
JIABS	Journal of the International Association of Buddhist Studies
JICH	Journal of Imperial and Commonwealth History
JJS	Journal of Japanese Studies
Jur Rev	Juridical Review
JSCL	Journal of Society of Comparative Legislation
JSS	Journal of Siam Society
Law&Hist Rev	Law and History Review
Legal Pluralism & Unofficial L	Legal Pluralism and Unofficial Law
LQR	Law Quarterly Review
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review

MJECL	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
New York UP	New York University Press
NJW	Neue Juristische Wochenschrift
Nw U L Rev	Northwestern University Law Review
OUP	Oxford University Press
Oxford U Comparative L Forum	Oxford University Comparative Law Forum
Penn Press	University of Pennsylvania Press
SOAS	School of Oriental and African Studies
Stan LR	Stanford Law Review
Thammasat UP	Thammasat University Press
Theoretical Inq L	Theoretical Inquiries in Law
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
Tul L Rev	Tulane Law Review
TU Press	Temple University Press
UA Press	University of Arizona Press
UC Press	University of California Press
UGA Press	University of Georgia Press
U Ill L Rev	University of Illinois Law Review
UNEAC	University of New England Asia Centre
U Pa L Rev	University of Pennsylvania Law Review
Victoria U Wellington L Rev	Victoria University Wellington Law Review
Windsor YB Access Just	Windsor Yearbook of Access to Justice
Yale LJ	Yale Law Journal
YUP	Yale University Press
ZEuP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZRG	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte</i>

TIMELINE

Date	Event
c 1238	Sukhothai Kingdom established
c 1351	Ayutthaya Kingdom established
1768	Thonburi Kingdom established
1782	Rattanakosin, Chakri Dynasty established: Bangkok becomes capital city; Rama I enthroned
1805	Three-Seal Code compiled
1851	King Mongkut (Rama IV) enthroned
1852	Anglo-Burmese War
1855	Anglo-Siamese Treaty (Bowring Treaty)
1856	American-Siamese Treaty and Franco-Siamese Treaty (Eleven more treaties were signed with foreign countries between 1858 and 1898)
1868	King Chulalongkorn (Rama V), introducer of wide variety of reforms to Siam, enthroned <i>Meiji Restoration (the enthronement of Emperor Meiji who proclaimed the Charter Oath setting out a modernisation plan) [Japan]</i>
1883	Anglo-Siamese Treaty revised leading to the establishment of the Siamese International Court
1890	<i>Japanese Civil Code mainly drafted by French draftsman Gustave Émile Boissonade (Code of 1890) promulgated [Japan]</i>
1892	Ministry of Justice established; reform of the court system <i>Japanese Code of 1890 postponed; new drafting committee appointed [Japan]</i>
1894	Legislative Council, interim government body to assist the monarch in making law, established
1896	<i>New Japanese Civil Code promulgated [Japan]</i> <i>BGB promulgated [Germany]</i>
1897	Law School of the Ministry of Justice, predominantly influenced by English law, established
1898	Japanese-Siamese Treaty contains clause to end extraterritoriality on the condition that Siam establishes law codes Work begins on drafting of the Penal Code <i>New Japanese Civil Code comes into force [Japan]</i>
1900	<i>BGB comes into force [Germany]</i>
1904	Franco-Siamese Treaty revised

Date	Event
1907	Franco-Siamese Treaty revised Drafting of the Penal Code completed
1908	Drafting of the Civil and Commercial Code begins under Georges Padoux's direction
1909	Anglo-Siamese Treaty revised
1910	Enthronement of King Vajiravudh (Rama VI)
1913	Padoux resigns after drafting 1335 articles
1916	Drafting body reformed; three Thai jurists added but majority remains French
1917	Chulalongkorn University established, first Thai higher education institution
1919	René Guyon appointed as chief draftsman Phraya Manavarajasevi (Plod na Songkhla) appointed as secretary to the drafting committee
1920	American-Siamese Treaty abolishes extraterritoriality
1922	Franco-Siamese Agreement requires Siamese government to establish department of legislative redaction and hire Frenchmen as legislative advisors to Ministry of Justice and directors of the Law School
1923	Council of Legal Studies established to administer the Law School in accordance with the civil law system
(Aug)	Department of Legislative Redaction established and the new drafting committee appointed with a Thai majority led by Phraya Jindabhirom (Plod's brother)
(Oct)	
(Nov)	Civil and Commercial Code promulgated with an effective date of 1 January 1925 ('Code of 1923')
1925	Drafting of the new Civil and Commercial Code ('Code of 1925') begins
(Mar)	Franco-Siamese Treaty concludes while setting time frame for ending extraterritoriality
(July)	Anglo-Siamese Treaty concludes while setting a time frame for end of extraterritoriality
(Oct)	Drafting of Book I on General Principles and Book II on Obligations of the Code of 1925 completed
(Nov)	Promulgation of Books I and II of the Code of 1925 and repeal of the Code of 1923 King Prajadhipok (Rama VII) enthroned

Date	Event
1926 (Jan)	Code of 1925 comes into force
1929	Book III on Specific Contracts of the Code of 1925 promulgated
1931	Book IV on Properties of the Code of 1925 promulgated
1932	Revolution changes absolute monarchy to constitutional monarchy
1933	Transfer of the Law School of the Ministry of Justice to Chulalongkorn University's newly-established Faculty of Law and Political Science
1934	Thammasat University established, takes over Chulalongkorn University's Faculty of Law and Political Science and is effectively the only law school in Thailand
1935	King Ananda Mahidol (Rama VIII) enthroned Book V on Family and Book VI on Succession of the Code of 1925 promulgated
1939	Country's name changes from Siam to Thailand
1946	King Bhumibol (King Rama IX) enthroned
1948	Institute of Legal Education of the Thai Bar (modelled on the English Inns of Court) established
1967	Thai Bar established
1971	Ramkhamhaeng University Faculty of Law established, second Thai law school
1972	Chulalongkorn University Faculty of Law established, third Thai law school
1976	Book V on Family of the Code of 1925 revised
1992	Book I on General Principles of the Code of 1925 revised

INTRODUCTION

1. THE MAKING OF THE CIVIL AND COMMERCIAL CODE OF 1925

On 11 November 1925, the Civil and Commercial Code of Thailand ('Code of 1925'), which contained Book I (on General Principles) and Book II (on Obligations) was promulgated to replace the Civil and Commercial Code of 1923 ('Code of 1923').¹ The promulgation of the Code of 1925 marked the end of the long, unsuccessful process of codification of private law in Thailand which began soon after the Penal Code came into effect in 1908. The modern codes emerged from a period in which the country was under threat from colonisation by Western powers. Thailand's jurisdictional sovereignty had been eroded by consular jurisdiction and the principle of extraterritoriality² as a result of a number of unbalanced commercial treaties modelled on the Anglo-Siamese Treaty of 1855 (commonly known as the Bowring Treaty) between the Thai and foreign governments.³ Increasing contacts with Western powers also provided Thai people with an opportunity to explore their own weaknesses by comparing their traditional values and systems with

¹ Government Gazette (11 November 1925) Book 42, 1-2. Book III on Specific Contracts was promulgated in 1929, Book IV on Properties in 1931, and Book V on Family and Book VI on Succession in 1935. Before the Thai government adopted the Gregorian calendar for the arrangement of the months in 1941, the New Year in Thailand started on 1 April. However, the government retained the use of the Buddhist Era (BE) which is approximately five hundred and forty-three years before the Common Era. When dealing with Thai documents dated before 1941, this thesis fully adopts the Gregorian calendar. For example, according to the Government Gazette, Book III of the Code of 1925 was promulgated on 1 January 2471 BE (1928 AD), which is 1 January 2472 BE (1929 AD) according to the Gregorian calendar. In this thesis, the promulgation date of Book III is written as 1 January 1929.

² According to John Bassett Moore, extraterritoriality is 'an extensive exemption from the operation of the local law'. This is 'owing to diversities in law, custom, and social habits, the citizens and subjects of nations possessing European civilization enjoy in countries of non-European civilization, chiefly in the East. Extraterritoriality is 'generally secured by treaties and in some instances is altogether based upon them, and its exercise is usually regulated by the legislation of the countries to whose citizens or subjects the privilege belongs'. John Bassett Moore, *A Digest of International Law*, vol 2 (Government Printing Office 1906) 593.

³ See Francis Bowes Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22 AJIL 70, 71-72.

perceived western ‘modernity’.⁴ Both external pressure and internal motivation accounted for the modernisation of the country – a process which began in the second half of the nineteenth century.

Relying heavily on the assistance of foreign advisers, King Chulalongkorn (Rama V) introduced a variety of reforms.⁵ Realising that negotiating the abolition of extraterritoriality required the establishment of a modern legal system, the king embarked upon a judicial reform beginning with modernising the court system and sending royals and nobles to study law in England from the 1890s. The travelling students became instrumental in setting up modern legal education based on the English system and ensuring the predominance of English law in the next forty years. Although both the modern Thai courts and the Law School of the Ministry of Justice established in 1897 were dominated by English common law, Chulalongkorn chose the civil law system as the model for modern Thai legislation.⁶ Codification of criminal law began in 1898 and was concluded successfully by a French-led drafting committee in 1907. The French influence increased when the work of codification of private law began in 1908 to the extent that the drafting of the civil and commercial code was from then on completely in the hands of French draftsmen.⁷ Their slow progress prompted King Vajiravudh (Rama VI) to add three English-educated Thai jurists to the drafting committee in 1916.⁸ However, it was not until 1923 that the work of codification underwent a transformation. The drafting committee’s composition changed so that the Thais outnumbered the French members, and the BGB replaced the French *Code civil* as the principal model for the Code of 1925. The Thai government tactfully rejected the French draft by promulgating it as the Code of 1923 but suspending it until it could be assessed by Thai legal professionals. As the government anticipated, the French-drafted Code was severely criticised for its incoherence and incomprehensibility, and this criticism paved the way for the drafting of a new civil and commercial code based on the BGB. All of these changes

⁴ Preedee Kasemsup, ‘Reception of Law in Thailand – A Buddhist Society’ in Masaji Chiba, *Asian Indigenous Law: In Interaction with Received Law* (KPI 1986) 291.

⁵ Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, CUP 2009) 68–69; MB Hooker, ‘The ‘Europeanization’ of Siam’s Law 1855–1908’ in MB Hooker (ed), *Laws of South-East Asia*, vol 2 (Butterworth 1988) 552, 564.

⁶ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/1,

‘พระราชหัตถเลขากรมพระสวัสดิวัดนวิศิษฐ์ ถวายพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว

เรื่องข้อเสนอดุริฎเกี่ยวกับการจัดระบบการศึกษากฎหมาย (Letter from Prince Svastiwatvisit to King Vajiravudh on Georges Padoux’s Memorandum on the Question on Legal Education in Siam)’ (15 March 1914).

⁷ See René Guyon, *The Work of Codification in Siam* (Imprimerie Nationale 1919) 9–10; National Archive of Thailand, Office of the Council of State Doc No 9, ‘Letter No 162/14272 from Robert Greg to Prince Tridos’ (5 December 1923).

⁸ Government Gazette (7 May 1916) Book 33, 40.

were masterminded by an English-educated Thai jurist, Phraya Manavarajasevi (Plod na Songkhla) ('Plod'), who, while studying in England, had been inspired by the success that the Japanese had had in establishing a civil code which was, as he believed, modelled on the BGB.⁹

The drafting committee consisting of three Thais, including Plod, and two Frenchmen began drafting the new Code in March 1925¹⁰ and spent only seven months finishing Books I and II, which were promulgated as the Code of 1925 in November.¹¹ The Code was first drafted in English before being translated into Thai. Insights into the drafting methods and materials used by the draftsmen of the Code of 1925 were provided by Plod more than fifty years after the Code came into effect. When giving interviews to a group of academics from the Thammasat University Faculty of Law between 1981 and 1982, Plod clarified many important issues concerning the making of the Code of 1925. He revealed that the Code of 1925 was founded on two main models, the BGB and the Japanese Civil Code of 1898 ('Minpō of 1898'), which was chosen because it was a simplified version of the former.¹² Plod admitted that the provisions of the Code of 1925 were 'copied' from rules mainly of the BGB and the Minpō of 1898, – the method that he had learnt from the Japanese draftsmen.¹³ Plod provided the names of the principal sources from which foreign provisions were copied and claimed to be the compiler of the list of statutes and materials which the draftsmen adopted as models for each provision of the Code of 1925 ('Plod's List of References').¹⁴ Plod's List of References has usually been consulted by those who wish to trace the origin of Books I and II and has sometimes given an impression that the Code of 1925 is a proper product of comparative law. Relying on Plod's List of References, Naoyuki Isogawa, Professor of Civil Law at Kyushu University, remarked that

⁹ See Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982).

¹⁰ Government Gazette (28 October 1923) Book 40, 128-30.

¹¹ See National Archive of Thailand, Office of the Council of State Doc No 3, Book 4(2), 'รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 กันยายน ถึง 27 มีนาคม พ.ศ. 2467 (Minutes of the Meetings of the Committee of Legislation)' (1 September 1924 - 27 March 1925); *ibid* Doc No 3, Book 5(1), 'รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 สิงหาคม ถึง 27 ตุลาคม พ.ศ. 2468 (Minutes of the Meetings of the Committee of Legislation)' (1 August - 27 October 1925).

¹² Manavarajasevi, *Interviews* 4, 13, 23, 42.

¹³ *ibid* 4.

¹⁴ See Phraya Manavarajasevi, อุทาหรณ์สำหรับประมวลกฎหมายแพ่งและพาณิชย์บรรพ 1-2 ฉบับกรรมาญกฎหมาย และที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-5 (Department of Legislative Drafting's Instances of Books I and II of the Civil and Commercial Code and Sources of the Provisions of Books I, II, II, IV, and V of the Civil and Commercial Code) (Bangkok University 1990).

TCCC [Thai Civil and Commercial Code of 1925] can more accurately than JCC [Japanese Civil Code of 1898] be characterized as **the genuine fruits of comparative jurisprudence**.¹⁵ [My emphasis]

2. ALAN WATSON'S THEORY OF LEGAL TRANSPLANTS

Taking account of Plod's interviews, one can reasonably link legal change in Thailand in 1925 to Alan Watson's theory of legal transplants.¹⁶ Watson, a renowned comparatist and Romanist, developed a theory within the contexts of comparative law and legal history that law changed mainly by borrowing. This theory is commonly known as the theory of 'legal transplants'.¹⁷ In Watson's view legal borrowing was driven by lawyers and lawmakers and was not decisively determined by external social, economic and political factors.¹⁸ The transplanting of legal rules was therefore 'socially easy'.¹⁹ Interestingly, Watson simplified legal development to the extent that he maintained that a successful legal transplant does not require 'a systematic knowledge of the law'.²⁰ His theory of legal transplants did not call attention to issues of the 'success' of a transplant or how the law borrowed developed.²¹ His notion of 'success' depends on the survival of the law,²² and his typical example of a successful transplant is the Minpō of 1898.²³ The simplicity of Watson's theory of legal transplants has attracted strong criticism from academics in different fields, mainly scholars of the sociology of law. Pierre Legrand argued that a legal transplant was 'impossible' because law has different meanings in different contexts.²⁴ Gunther Teubner offered a new explanation for legal change: he submitted that the borrowed rule will become a legal irritant in the new

¹⁵ Naoyuki Isogawa, 'The Japanese Civil Code in the World Legal Systems: Toward a Comparative Study of the Asian Civil Law' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 165.

¹⁶ See Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nodic Din'' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 213.

¹⁷ See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, UGA Press 1993).

¹⁸ Alan Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 315; Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 102.

¹⁹ Watson, *Legal Transplants* 95.

²⁰ Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 79.

²¹ Jan Smits, 'On Successful Legal Transplants in a Future Ius Commune Europaeum' in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 140.

²² Watson, *Legal Transplants* 20.

²³ Watson, 'Legal Transplants and Law Reform' 82–83.

²⁴ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 111, 114.

environment because 'the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.²⁵ Disputing the relationship between law and society with Watson, leading legal sociologists, such as Lawrence Friedman,²⁶ Roger Cotterrell,²⁷ and David Nelken,²⁸ insisted on the significance of external factors. Their common thesis is that social and legal change are correlated.

This lively debate demonstrates that the issue of legal transplants could be approached from different angles. For this reason, a careful exploration of Watson's theory of legal transplants and its opposing theories may offer a better understanding of legal change and provide a proper approach for understanding how and why Thai private law changed in 1925.²⁹

3. THE DEVELOPMENT OF THE CODE OF 1925

The debate concerning legal transplants should, however, not be confined to the questions of how and why law is borrowed. Attention should also be given to another important question as to how the law borrowed has developed, or in other words, whether the transplantation has been successful.³⁰ If the factors of success of a transplant are as simple as Watson's suggested, based on the fact that the Code of 1925 has survived for nearly a century, and most of its main features, especially concerning the law of obligations, have been left untouched,³¹ one may easily

²⁵ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 MLR 11, 12.

²⁶ Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 269. Friedman sees American law as 'a mirror of society'. Lawrence M Friedman, *A History of American Law* (Simon & Schuster 1985) 12.

²⁷ Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 90.

²⁸ David Nelken, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 Windsor YB Access Just 349, 354; David Nelken, 'Towards a Sociology of Legal Adaptation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 21-22.

²⁹ Michele Graziadei believes that 'the study of legal transplants may be helpful to developing more interesting models of how the law changes than those currently available from a mainstream point of view'. Michele Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' (2009) 10 Theoretical Inq L 693, 694.

³⁰ See Nelken, 'Meaning of Success' 349-64; Smits, 'On Successful Legal Transplants' 137-54. Similarly, Graziadei holds that '[i]t is one thing to notice that legal transplants happen. But to have an inkling of what goes on when they happen is quite another. It is virtually impossible to make sense of legal transplants without inquiring what legal change implies in empirical terms...' Graziadei, 'Legal Transplants' 704.

³¹ Book I underwent a number of changes most of which were trivial. A major reform took place in 1992 where the provisions concerning juristic persons and prescription, were amended. See Government Gazette (8 April 1992) Book 109, 1.

conclude that the reception of foreign law in 1925 was successful. However, considering the state of academic debates about this topic in Thailand, it is unclear whether certain underlying problems resulted from conflicting approaches to interpreting the law or the law itself. For example, giving a presentation on the topic 'The Right to Terminate a Contract under Thai Law in Case of Non-performance of Obligations',³² Daraporn Thirawat, an expert on the Thai law of obligations and a doctor of law from France, said that in case of non-performance the Code of 1925 gave the creditor the right to choose between performance and rescission and if he decided to rescind the contract he no longer had the right to specific performance.³³ Daraporn³⁴ pointed out that the draftsmen of the Code of 1925 based Articles 387 and 388 of the Code of 1925 concerning the right to rescind a contract on Articles 514 and 542 of the Minpō of 1898, which were modelled on the BGB.³⁵ Kittisak Prokati,³⁶ a doctor of law from Germany and respondent of Daraporn's presentation, argued that according to the German law of obligations, it was a general principle that the creditor had to claim performance first before resorting to other remedies, namely damages and rescission.³⁷ Kittisak observed that Thai academics and judges seemed to have accepted the notion of choices of remedies for non-performance.³⁸ It is clear that Daraporn's and Kittisak's views on the character of the Thai concept of non-performance were not based on conflicting theories; Daraporn did not attempt to explain the Thai concept of remedies for non-performance based on the legal system most familiar to her, namely French law, but she and Kittisak were, in fact, discussing the same concept, the German concept of non-performance.

Daraporn's perception of German law's influence on remedies is most likely shaped by a mainstream conception among Thai lawyers and scholars that because the Code of 1925 'was drafted on the lines of the Japanese Civil Code, which was modelled after the German Civil Code', the Thai Code is a reflection of the German Code.³⁹ But is this broad conception correct? If so, why did Kittisak disagree with

³² A topic presented at the International Symposium in Bangkok Thailand between 6-7 November 1997. This event was organised by Thammasat University Faculty of law and Kyushu University Faculty of Law.

³³ Daraporn Thirawat, 'The Right to Terminate a Contract under Thai law in Case of Non-performance of Obligations' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 171.

³⁴ For Thai readers' convenience, in this thesis, Thais are mentioned by their first name. Calling each other only by their family name is unusual in Thailand.

³⁵ Thirawat, 'Right to Terminate a Contract' 176.

³⁶ Professor of Law at Thammasat University and associate member of the International Academy of Comparative Law.

³⁷ Thirawat, 'Right to Terminate a Contract' 203.

³⁸ *ibid.*

³⁹ Kasemsup, 'Reception of Law in Thailand' 293.

Daraporn's understanding of the Thai remedies for non-performance which she believed was based on German law? Did this result from a misunderstanding? If so, whose, the interpreter's or the draftsmen's? If this misunderstanding was a direct result of the drafting of the Code of 1925, can one still claim that the making of this Code was fully successful?

4. RESEARCH QUESTIONS, METHODOLOGY AND THE CASE STUDY

This thesis examines the making of the Code of 1925 with the central focus on the method that the draftsmen employed in the drafting and ascertains whether such drafting method has affected Thai lawyers' understanding of its provisions and concepts. Accordingly, it sets up two main questions: first, in which manner Thai private law changed in 1925 and, second, whether the reception of foreign private law through a particular drafting method caused any problems for Thai lawyers' understanding of the Code of 1925. To understand legal change in Thailand in 1925, various theories on the reception were studied. Since Watson's theory of legal transplants seems to explain the modernisation of Thai private law appropriately, the first question was approached with his theory. However, several important arguments, such as that of Legrand, Teubner and some sociologists, such as Cotterrell and Nelken, which revolve around Watson's theory of legal transplants, are also taken into account to establish the most plausible explanation for the reception of foreign private law in Thailand. This provides a chance to discover whether the Thai reception occurred in the manner which Watson propounded.

The second question of this thesis concerns the issue of success of receptions. The importance of this question was emphasised by John Merryman, who holds that '[m]ost fundamental is the completely unresolved question whether successful transplants are beneficial or detrimental in their impact'.⁴⁰ If one inclines towards Watson's notion of successful borrowing, one perhaps does not find any significant problem arising from a legal transplant as long as the law survives. This thesis, however, rests on the assumption that some theoretical problems, such as the one discussed above, have resulted from the Code of 1925 itself. This means that there may have been some defects in the drafting of the Code. A possible defect is incompatibility between rules arising from the draftsmen's lack of knowledge of the

⁴⁰ John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Mauro Cappelletti, *New Perspectives for a Common Law of Europe* (Badia Fiesolana 1978) 209.

rules that they 'copied'. Disputing the relevance of draftsmen's systematic knowledge of the law borrowed with Watson, this author suspects that this defect led to some difficulties in understanding and interpreting a rule or a concept. Thus to investigate the second question this thesis will establish a link between the cause, incompatibility between rules arising from the draftsmen's lack of legal knowledge about the rules adopted, and the resulting problems with the interpretation of the rules. It is reasonable to hold that, if lack of 'a systematic knowledge of the law' borrowed proves to have led to difficulties in understanding it, one cannot fully agree with Watson that 'a systematic knowledge of the law' is not necessary for successful borrowing and that success of a reception depends on the survival of the law. To research the second question, the drafting method, the draftsmen's knowledge of the legal rules borrowed at the time of the reception, and lawyers' understanding of the rules established, must be taken into account. Based on this requirement, research on the entire Code of 1925 is not feasible for a PhD thesis. A case study is therefore needed.

Specific performance has been selected as the case study to investigate the second question. The case study also offers an opportunity for analysis of the method that the draftsmen of 1925 employed. This will more specifically confirm the findings of the research on the first question. The reason for choosing specific performance is twofold. First, specific performance is a core principle of the law of obligations in the civil law system.⁴¹ In Germany, specific performance is, in Ernst Rabel's terms, the 'backbone' of the German law of obligations.⁴² Although this concept is not expressed in so many words, and its existence has to be assumed from a number of BGB provisions,⁴³ mainly s 241,⁴⁴ the primacy of specific performance has long firmly been established in German law.⁴⁵ As a contractual

⁴¹ See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 1-10.

⁴² Jens Kleinschmidt, 'Specific Performance', *The Max Planck Encyclopedia of European Private Law*, vol 2 (2012) 1581.

⁴³ GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 51.

⁴⁴ Werner Lorenz, 'Reform of the German Law of Breach of Contract' (1997) 1 Edin LR 317, 331; Zimmermann, *Law of Obligations* 776; Florian Faust and Volker Wiese, 'Specific Performance: A German Perspective' in JM Smits and others (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia 2008) 50.

⁴⁵ See K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 472; Ernst J Cohn, *Manual of German Law* (2nd edn, BIICL 1968) 94; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 43; Dagmar Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 138.

remedy,⁴⁶ specific performance is not an isolated concept, but it is related to other rules and concepts within the realm of non-performance. When considering whether specific performance is the primary remedy for non-performance, other remedies especially damages must also be taken into account. This thesis therefore focuses on the principle of the primacy of specific performance and explores the relationship between specific performance and other remedies for non-performance, mainly damages. Second, specific performance is a dividing line between common law and civil law even among members of the civil law family, including French and German law.⁴⁷ Lawyers from different legal systems understand the concept of specific performance differently, and the definition of the term 'specific performance' has not yet been universally established.⁴⁸ Henrik Lando and Caspar Rose claim that

The standard definition of specific performance is that when a party to contract does not perform his or her obligations, e.g. due to late delivery or the delivery of defective goods, the other party can claim performance by the breaching party in accordance with the contract.⁴⁹

But according to Guenter Treitel, in civil law systems specific performance may include:

any process by which the creditor receives the substance of what he bargains for... They include, for example, the process whereby the creditor can have the contract executed or a defect cured at the expense of the debtor, and the process whereby a substitute may be bought at the expense of the debtor.⁵⁰

German lawyers, in particular, do not understand the concept of specific performance as narrowly as a 'remedy' of breach of contract⁵¹ or a means of

⁴⁶ The term 'remedy' does not perfectly represent the true nature of specific performance in German law. But for comparative purposes, German scholars generally accept its use when expounding on the concept of specific performance in the context of non-performance in English. This is also the case in French law where until recently the term 'remedy' has not been used 'to describe the nature of the possible responses of the law to contractual non-performance'. John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (2nd edn, OUP 2008) 349. See also Denis Tallon, 'French Report' in Donald Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparisons* (Clarendon Press 1989) 263-64.

⁴⁷ John P Dawson, 'Specific Performance in France and Germany' (1959) 57 *Mich L Rev* 495, 525. See also Cohn, *Manual of German Law* 94.

⁴⁸ See Treitel, *Remedies for Breach of Contract* 43-46.

⁴⁹ Hendrik Lando and Caspar Rose, 'On the Enforcement of Specific Performance in Civil Law Countries' (2004) 24 *IRLE* 437, 474.

⁵⁰ Treitel, *Remedies for Breach of Contract* 46.

⁵¹ In this thesis, the terms 'breach of contract' and 'non-performance' are interchangeable.

‘enforcing’ performance. Their understanding of the concept of specific performance is closely associated with the concept of ‘claim’ (*Anspruch*) which is defined in s 194 BGB as ‘the right to require another person to do or to refrain from doing an act’.⁵² When considering claims arising from a contract, German lawyers usually draw a distinction between:

(1.) an *Anspruch* that arises from the formation of the contract itself and is directed at the fulfilment of the contractual promise and (2.) an *Anspruch* that arises due to a breach of contract. The former type of *Anspruch* is called *Erfüllungsanspruch* or *Primäranspruch* (primary claim), the latter type *Sekundäranspruch* (secondary claim) because it complements or replaces the *Primäranspruch* if a breach has occurred. The most important *Sekundäranspruch* consists in a claim for damages (*Schadensersatzanspruch*).⁵³

Florian Faust and Volker Wiese therefore conclude that

German lawyers would not raise the question whether specific performance should be *granted* in cases of breach of contract, because in their understanding a claim for specific performance has been in existence since the contract was concluded, long before the breach. They would rather ask whether the breach led to the loss of the claim for specific performance (for instance because performance became impossible) and, perhaps, to its replacement by a claim for ‘damages in lieu of performance’ (*Schadensersatz statt der Leistung*).⁵⁴

In other words, in German law, specific performance is the primary contractual claim. In a broader sense, it is also the primary remedy in case of non-performance on the grounds that the creditor retains his right to claim performance until he has and chooses secondary claims, for example the right to claim damages instead of performance and the right to rescind the contract. Thus when referring specific performance as the primary remedy in German law, one must keep the broad meaning of specific performance in mind. This meaning is appropriately conveyed by Treitel:

⁵² Faust and Wiese, ‘Specific Performance’ 50. The quotation is an English translation of s 194 by Geoffrey Thomas and Gerhard Dannemann, ‘German Law Archive’ <<http://www.iuscomp.org/gla/>> accessed 10 April 2013; See also Basil Markesinis, Werner Lorenz, and Gerhard Dannemann, *The German Law of Obligations* (Clarendon Press 1997) 19-20.

⁵³ Faust and Wiese, *ibid.* See also Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 398.

⁵⁴ Faust and Wiese, *ibid.* See also Ernst A Kramer, ‘§241’ in Helmut Heinrichs, Kurt Rebmann and Franz Jürgen Säcker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2 (Beck Verlag 1979) 60.

By [specific performance]⁵⁵ is meant, in its broadest sense, a process whereby the creditor obtains as nearly as possible the actual subject-matter of his bargain, as opposed to compensation in money for failing to obtain it. Such compensation is also 'enforcement' of the contract in the sense of putting the creditor into the same financial position as that in which he would have been, if the contract had been performed: from this point of view, it may be contrasted with the remedies of refusal to perform and of putting an end to the contract. But such compensation in money is not 'enforced performance' in the sense here under discussion in that its object is not to give the creditor the very thing for which he bargained.⁵⁶

The distinct positions on specific performance among three major legal systems, namely English, French and German law, facilitate the identification of effects of the reception in this thesis. Comparatists who possess sufficient knowledge of private law, more specifically the law of obligations, of different legal systems should recognise the differences between French, German and English law. For example, if one employs a French jurist who has no knowledge of and information on this distinction to draft some provisions of specific performance reflecting the German legal tradition, he might end up writing specific performance rules based on the *Code civil* in the belief that all civil law jurisdictions share the same concept of specific performance. This may lead to confusion over the interpretation of the rules especially if the interpreter thinks of them as German-influenced rules.

The reception of law and its effects on the understanding of the law means that the focus of this thesis is on doctrinal effects of the reception. Although the effects of the reception can be measured differently, for example from social and economic perspectives, a thorough analysis of a particular aspect of success of the reception is the only option for a PhD thesis. More importantly, special care is taken to ascertain whether Watson's claim that a successful legal transplant does not require 'a systematic knowledge of the law' is plausible.⁵⁷ This question of Thai lawyers' understanding and knowledge of the law received needs to be explored doctrinally. If success of the transplant is measured merely by its occurrence it is undeniable that this claim is true. Because the occurrence of a transplant is

⁵⁵ Treitel uses the term 'enforced performance' to avoid the confusion which potentially arises from the use of the term 'specific performance', which originates from common law. See Markesinis and others, *German Law of Contract* 398. However, in this thesis the latter is preferred to reflect a general trend that the use of 'specific performance' is no longer peculiar to the common law system.

⁵⁶ Treitel, *Remedies for Breach of Contract* 43.

⁵⁷ Eric Stein encourages a verification of this claim saying that '[i]t would be interesting indeed to investigate, for example, how much the Japanese and Turkish experts knew about the Western systems which they recommended for reception to their law makers'. Eric Stein, 'Uses, Misuses – and Nonuses of Comparative Law' (1977-78) 72 Nw U L Rev 198, 209.

determined by those who hold legislative power, to ask whether a transplant occurs or not may not be a worthwhile question. Thus comparatists should ask instead what happens after the reception, ie whether the law is incorporated into the society and whether it has been understood as the draftsmen expected it to be.⁵⁸

Both legal history and comparative law are employed to answer two main questions of this thesis. A number of historical documents, including the minutes of the meetings of the draftsmen, relevant drafting documents, and foreign statutes and materials that they consulted, are considered. A comparative method is used to explore the concept of specific performance mainly in the German, Japanese and Thai legal systems. The examination of the making of the Code of 1925 also provides an opportunity to determine the draftsmen's employment of comparative law and legal history.

5. ORIGINAL CONTRIBUTIONS

Andrew Harding identified a shortage of comparative research on Southeast Asian law saying:

In the main streams and occasional eddies of comparative law, as well as in the related fields of comparative sociology of law, legal theory in general, and law and development, virtually no account has been taken of the South East Asian legal experience, even though some excellent and highly relevant work on the region has been done. Scholars in the field of law in South East Asia have therefore trodden a somewhat lonely path.⁵⁹

Harding's concern is well illustrated by the absence of an assessment of the modernisation of Thai private law and its effects given that the Code of 1925 has been at work for nearly a century.⁶⁰ Unfortunately, there have been only a handful of publications in Thailand on the making of the Thai code, for example

‘การปฏิรูปกฎหมายของประเทศไทยตั้งแต่ พ.ศ. 2411 จนถึง พ.ศ. 2478’ (The Law Reform in Thailand from

⁵⁸ See JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public law* (Clarendon Press 1996) 15; Cotterrell, ‘Is There a Logic of Legal Transplants?’ 79.

⁵⁹ Harding, ‘Comparative Law and Legal Transplantation in South East Asia’ 199.

⁶⁰ However, traditional Thai law has been studied extensively by many scholars, notably Tokichi Masao (1869-1921), a draftsman of the Thai Penal Code, who wrote a doctoral thesis on Ancient Thai law at Yale University, Robert Lingat (1892-1972), an eminent French scholar and prolific writer on ancient Indian, Thai and Burmese law, Yoneo Ishii (1929-2010), an eminent Japanese scholar of Southeast Asian Studies, and Andrew Huxley, Professor of Southeast Asian Law at SOAS, a prominent expert on Traditional Thai and Burmese law and Buddhist Law.

1868 to 1935 AD)⁶¹ and ‘การจัดร่างประมวลกฎหมายแพ่งและพาณิชย์: พ.ศ. 2451-2478’ (The Drafting of Siamese Civil and Commercial Code: from 1908 to 1935 AD),⁶² both of which are masters dissertations in history. These focus on general facts about codification and the drafting organisations. A study of the methods that the draftsmen employed in drafting the Code and the effects of their drafting methods has not been undertaken. When tracing the origin of a provision of the Code of 1925, Thai researchers and the interpreter of a rule usually rely on Plod’s List of References. However, no one has ever validated this source of information. If there is a mistake in it, the interpretation of the rule in question may be affected.

The original contribution of this thesis therefore lies in the fact that the making of the Code of 1925, especially the method the draftsmen employed in making its provisions, and the effects of the use of such method have never been thoroughly investigated before. The thesis also contributes to the development of comparative law, legal history and private law in Thailand, especially the law of obligations, by calling attention to legal change in 1925. It will also raise academic awareness of the roles of comparative law and legal history in the reception of law among Thai lawyers by promoting their proper use for understanding of rules and concepts of the Code of 1925.

6. THESIS OUTLINE

Chapter 1, ‘Legal Transplants: A History’, explores Watson’s theory of legal transplants and arguments against it to establish a method for studying the modernisation of Thai private law in 1925. The chapter begins by considering the notion of legal transplants prior to Watson’s theory of legal transplants and examines core ideas of the theory of legal transplants and theories and arguments revolving around it. Since the success of the reception is a main question of thesis, the chapter addresses this issue specifically.

Chapter 2, ‘The Modernisation of Thai Law: Background’, provides a broad overview of the modernisation of Thai law, including the reforms of the administration of justice and legal education, and codification of civil and commercial law. This paves the way for a thorough examination of the making of

⁶¹ See Patcharin Piamsomboon, ‘การปฏิรูปกฎหมายของประเทศไทยตั้งแต่ พ.ศ. 2411 จนถึง พ.ศ. 2478 (The Law Reform in Thailand from 1868 to 1935 AD)’ (MA Thesis, Chulalongkorn University 1974).

⁶² Pakdi Phagagrong, ‘การจัดร่างประมวลกฎหมายแพ่งและพาณิชย์: พ.ศ. 2451-2478 (The Drafting of Siamese Civil and Commercial Code: from 1908 to 1935 AD)’ (MA Thesis, Silpakorn University 1994).

the Code of 1925 in Chapter 3. Legal change does not occur independently of society, and therefore this chapter pays attention to conditions of traditional Thai society and law and factors which influenced changes.

Chapter 3, 'The Making of the Civil and Commercial Code of 1925', surveys the methods that the Thai draftsmen employed and materials that they consulted in drafting the Code of 1925. This chapter reveals the manner in which Thai private law changed and ascertains whether the reception of foreign private law in Thailand is an example of a Watsonian legal transplant. This chapter is divided into two parts, first, the role of the draftsmen of the Code of 1925 with a focus on Plod's role in the shift of policy to adopt the BGB and the Minpō as the principal models and the new drafting method, and second, methods and materials used for drafting the Code of 1925.

Chapter 4, 'The German Concept of Specific Performance', is the first chapter to deal with the case study. The focus of this chapter is on the principle of the primacy of specific performance in German law, and it is also divided into two parts: its historical development prior to the BGB and specific performance under the BGB. The latter includes an examination of Ernest Schuster's *The Principles of German Civil Law*, the draftsmen's main source for their knowledge of the BGB, to discover whether information on the German concept of specific performance was accessible to the draftsmen. Based on Plod's conception that the Minpō was practically a copy of the BGB, this chapter paves the way for the examining of the Japanese concept of specific performance in Chapter 5.

Chapter 5, 'The Reception of German Law in Japan and the Japanese Concept of Specific Performance', contains two parts. Plod's conception of the close relationship between the BGB and the Minpō of 1898 is confirmed through an investigation of the reception of German law in Japan. JE de Becker's *Annotated Civil Code of Japan*, on which the draftsmen of the Code of 1925 relied heavily, is then examined to ascertain whether its information is reliable. This research is crucial to this thesis because the copying of the provisions of the Minpō was derived from the annotations found in this book. The second part of the chapter deals with the Japanese concept of specific performance to explore its character and determine whether it was based on the German concept of specific performance.

Chapter 6, 'The Drafting of the Rules of Specific Performance in the Civil and Commercial Code of 1925 and Conceptions of Specific Performance in Thai Law', looks at the making of the rules concerning specific performance in the Code of 1925 as a specific example of the employment of the drafting method discussed in Chapter 3 and Thai lawyers' conceptions of specific performance. It then ascertains

whether problems with the understanding and interpretation of the rules are caused by the method that the draftsmen employed in the drafting of the Code of 1925.

The Conclusion answers the two main questions of this thesis: how did Thai private law change in 1925 and did the reception of foreign private law through a particular drafting method cause any problems for Thai lawyers' understanding of the Code of 1925? The lessons from the case study will also be used to assess whether Watson's theory of legal transplants explains the reception of law in Thailand appropriately and whether his contention that successful legal borrowing does not require 'a systematic knowledge of the law' is authenticated by the Thai experience.

CHAPTER 1

LEGAL TRANSPLANTS: A HISTORY

INTRODUCTION

The laws which would be the best for England, the country from which the laws are to be transferred, being given, the next object of consideration is, By what principles are the variations necessary to be made in these laws, in order to accommodate them to the circumstances of Bengal, the country into which they are to be transferred, to be determined.¹

This quotation is taken from a paper of Jeremy Bentham (1748-1832), entitled 'Of the Influence of Time and Place in Matters of Legislation', and it confirms that the idea of 'legal transplants' was discussed in Great Britain as early as 1782.² But it was not until 1974, when Alan Watson developed the theory of legal transplants, the main thesis of which is that law develops mostly by borrowing,³ that legal transplants became a focus of the study of legal change and a central paradigm in comparative legal studies.⁴ Despite the emergence of comparative law as a new branch of legal science in Great Britain in the second half of the nineteenth century, in the early stages of comparative law, British comparatists saw their method as a tool for serving practical interests, especially of the British Empire.⁵ Legal borrowing was discussed, not as a source of legal change but rather as a result of comparison.

¹ Jeremy Bentham, 'Essay on the Influence of Time and Place in Matters of Legislation' in John Bowring (ed), *The Works of Jeremy Bentham*, vol 1 (Russell & Russell 1962) 172.

² The year in which the paper was first drafted.

³ Alan Watson, *Society and Legal Change* (2nd edn, TU Press 2001) 95.

⁴ Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 442-43; Gilles Cuniberti, 'Enhancing Judicial Reputation through Legal Transplants: Estoppel Travels to France' (2012) 60 AJCL 383, 383; John W Cairns, 'Watson, Walton, and the History of Legal Transplants', (2013) Ga J Int'l & Comp L (forthcoming) 34, 34-35, 41. See also Andrew Huxley, 'Jeremy Bentham on Legal Transplants' (2007) 2 JCL 177, 177.

⁵ John W Cairns, 'Development of Comparative Law in Great Britain' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 133.

Thanks to Watson, legal transplantation has not only been seen as a result but also an approach to comparative law.

This historical chapter informs the theoretical basis of the two main questions of this thesis which concern the making of Thailand's Civil and Commercial Code in 1925 ('Code of 1925') and the effects of the drafting method used to create it. Since Thai law during the nineteenth and twentieth centuries developed mainly through borrowing foreign law,⁶ Watson's theory of legal transplants and its rival theories must form the core of this discussion. This chapter seeks to understand how Watson and others explain the reception of law and how they perceive success of the reception so as to discover a suitable approach for studying legal change in Thai private law in 1925. Watson's theory of legal transplants is not an isolated idea but a part of the development of legal scholarship in Great Britain, especially regarding the study of legal change and comparative law. A broad overview of how the study of legal change in Great Britain has developed, especially within the context of comparative law, is needed for a full picture of the issues involved. This chapter is therefore divided into three parts, historical reflections of the notion of legal transplants prior to Watson, Watson's theory of legal transplants and success of receptions.

1. LEGAL TRANSPLANTS PRIOR TO ALAN WATSON: HISTORICAL REFLECTIONS

The aim of this section is not to provide a detailed history of legal transplants⁷ but merely to survey the contributions of some of the more important historical figures and their impact on the history of legal transplants.

1.1 Bentham and legal transplants

Bentham wrote a treatise entitled 'Of the Influence of Time and Place in Matters of Legislation' ('Time and Place') in 1782.⁸ It was published twenty years later. Although Bentham used the phrase 'transplanting laws' instead of 'legal

⁶ Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nodid Din"' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 213.

⁷ For a detailed historical account of legal transplants see Cairns, 'Watson' 1-41.

⁸ Bentham's essay had five chapters: 'Principles to be Followed in Transplanting Laws', 'Regard to be Paid to Subsisting Institutions', 'Rules Respecting the Method of Transplanting Laws', 'Laws Appear the Worse for Being Transplanted', and 'Influence of Time'.

transplants', this essay deals with the subject of legal borrowing⁹ which Alan Watson later popularised as 'legal transplants'. Andrew Huxley believes that Bentham is the first scholar in Great Britain, who used the term 'transplant' with the notion of legal change¹⁰ but observes that, 'though Watson read 'Time and Place', he did not allow it to influence his own approach to legal change and legal transplant'.¹¹ Through this paper, Bentham offered the East India Company practical advice on the establishment of Anglo-Bengali law.¹² Unlike Watson, whose theory of legal transplants concerns the recipient country and serves an academic purpose, Bentham was more concerned with the interests of the donor country, imperialism and pragmatism.¹³ Comparing the contexts of British society in the late eighteenth century with the second half of the twentieth century, the difference between the focuses of Bentham's and Watson's legal transplants is understandable. It will be shown in the next sections of this chapter that the early studies of legal change and the early development of comparative law in Great Britain during the nineteenth century were closely associated with pragmatism and imperialism.

Huxley identified Bentham's three main arguments concerning legal positivism, imperialism and the reform of English law.¹⁴ Bentham argued against Montesquieu's notion of the peculiarity of law.¹⁵ Based on utilitarian principles, Bentham holds that the best law for one country can also be the best law for another.¹⁶ He claims that

The whole of history proves, that there is no circumstance connected with climate or texture of the earth incompatible with the happiness of man; and that, whatever men can live, there they may possess a government, a religion, and manners, that will render them happy.¹⁷

⁹ See Bentham, 'Time and Place' 169-94.

¹⁰ Huxley, 'Jeremy Bentham' 182.

¹¹ *ibid* 177. In his *Legal Transplants: An Approach to Comparative Law* (1974), Watson quoted a short passage from Bentham's 'Time and Place'. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, UGA Press 1993) 35.

¹² Bentham, 'Time and Place' 171-72.

¹³ See comparison between Bentham's and Watson's notions of legal transplants in Huxley, 'Jeremy Bentham' 186-87.

¹⁴ Huxley, 'Jeremy Bentham' 178.

¹⁵ In his famous book *De l'esprit des lois* (The Spirit of Laws), Montesquieu submits that 'the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such manner to the people for whom they are framed that it should be a great chance if those of one nation suit another...They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives'. Charles de Secondat Montesquieu, *The Spirit of Laws*, vol 1 (Thomas Nugent tr, Colonial Press 1899) 6-7.

¹⁶ Bentham, 'Time and Place' 172-80. See also Huxley, 'Jeremy Bentham' 179.

¹⁷ Bentham, *ibid* 177.

Driven by his strong imperialistic view,¹⁸ Bentham was more concerned with how the donor country implanted legal rules in the recipient country than with how the recipient country received legal rules from the donor country.¹⁹ He, for example, urged English lawgivers to learn 'how to accommodate his laws to the circumstances of Bengal'.²⁰ In the last two chapters, Bentham discussed the inadequacy and the need to reform English law. He suggested that an improvement of Anglo-Bengali law 'would also be better even for England'.²¹

1.2 Savigny, Maine and Jhering on 'legal evolution'

More than half a century after the first publication of Bentham's 'Time and Place', Henry Maine (1822-88) published *Ancient Law*, a work on legal evolution, which had a profound impact on British legal scholarship, especially historical jurisprudence and legal sociology.²² Clearly, Maine's work was not influenced by Bentham's notion of legal transplants; conversely, it portrays his criticism of utilitarian principles.²³ It has been suggested that Maine's approach to legal change was influenced by Savigny's historical jurisprudence.²⁴ Maine admired Savigny,²⁵ but it is not clear to what extent his work was based on Savigny's ideas because Maine never expressed an acknowledgement of Savigny's influence on his work.²⁶ Peter Stein observes that an obvious connection between the two scholars was that Maine

¹⁸ Huxley, 'Jeremy Bentham' 177.

¹⁹ Bentham dedicated Chapter 3 for a list of principles for good transplation. See Bentham, 'Time and Place' 180-84.

²⁰ *ibid* 172.

²¹ *ibid* 185.

²² HC Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (CUP 1946) 16-17; Robert Redfield, 'Maine's Ancient Law in the Light of Primitive Societies' (1950) 3 WPQ 574, 574-575; E Donald Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 Col LR 38, 46; RCJ Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (CUP 2004) 141-95; Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (OUP 1995) 79; George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822-1888* (Longmans 1969) 58.

²³ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (8th edn, J Murray 1880) 7-8. See also Cocks, *ibid* 2-3; Peter Stein, *Legal Evolution: The Story of an Idea* (CUP 1980) 89.

²⁴ Paul Vinogradoff, 'The Teaching of Sir Henry Maine' (1904) 20 LQR 119, 119; Peter Stein, *Roman Law in European History* (CUP 1999) 126; Frederick Pollock, *Oxford Lectures and Other Discourses* (Macmillan 1890) 153.

²⁵ In his *Ancient Law*, Maine refers to Savigny as 'the Great German Jurist'. Maine, *Ancient Law* 254.

²⁶ Cocks, *Sir Henry Maine* 26.

'was also concerned with the history of legal institutions in the manner of Savigny'.²⁷

To understand Savigny's historical approach to legal evolution, one needs to take account of social and political context of the Germany of his time. In 1804, France successfully enacted a civil code, known as the *Code Napoléon*, which unified largely classical Roman law, some French customary law²⁸ and some libertarian ideas which were products of the French Revolution.²⁹ The French Civil Code was widely adopted in many western German states following Napoleon's victory over Prussia and Austria at the beginning of the nineteenth century. However, the defeat of the French allowed German nationalism to grow, even among scholars. Anton Friedrich Justus Thibaut (1772-1840) began to discuss the necessity of having a unified civil code for the sake of a unified Germany in 1814.³⁰ Responding to Thibaut's proposal for codification, Friedrich Carl von Savigny (1779-1861), a leading figure of the German Historical School published a pamphlet entitled *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Of the Vocation of Our Age for Legislation and Jurisprudence).³¹ Inspired by Montesquieu's notion that good law must be founded on the spirit of the society,³² Savigny argued that law and culture were closely connected and developed together. He especially noted the relationship between law and society:

...this organic connection of the law with the essence and character of a people manifests itself also over time, and here also it is to be compared to language. As with language, so too the law does not stand absolutely still for even an instant, but undergoes the same movement and evolution is subject to the same law of internal necessity as every earlier development, therefore, the law grows forward with a people, constitutes itself out of them, and finally becomes extinct as a people lose their individuality.³³

²⁷ Stein, *Legal Evolution* 89.

²⁸ Stein, *Roman Law* 114–15.

²⁹ FH Lawson, AE Anton, and L Neville Brown, *Amos and Walton's Introduction to French Law* (3rd edn, Clarendon Press 1967) 31. For instance, John Dawson suggests that the French Civil Code does not allow the debtor to be forced to do or not to something because of 'the reaction of the Revolution against arbitrary power'. John P Dawson, 'Specific Performance in France and Germany' (1959) 57 *Mich L Rev* 495, 510.

³⁰ Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir tr, Clarendon Press 1996) 310; Arthur von Mehren and James Russell Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little, Brown 1977) 60–61; Mathias Reimann, 'The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code' (1989) 37 *AJCL* 95, 97.

³¹ Wieacker, *ibid* 309–10.

³² Stein, *Legal Evolution* 57. See Montesquieu's statement in n 15.

³³ Friedrich Karl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Keip 1997) 8–9 translated by Elliott in 'Evolutionary Tradition' 42.

According to Savigny, legal development is driven by two forces, custom and jurisprudence: 'all law...is first developed by custom and, next by jurisprudence, – everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.'³⁴ He sees codification as radical change effected by the will of government, of which he disapproves.³⁵

Maine most likely adopted Savigny's historical jurisprudence when studying the law of ancient societies.³⁶ As Great Britain's trend towards the scientific analysis of law grew in the mid-nineteenth century,³⁷ Maine became concerned with using scientific methods for his work on legal evolution.³⁸ He studied legal development from Roman to his own times and explained the relationship between societal and legal developments from a broad historical perspective. Maine perceived that law changed in a definite pattern or sequence³⁹ and it evolved in a way predetermined by the development of society.⁴⁰ His most famous proposition is the remark that 'the movement of the progressive societies has ... been a movement *from Status to Contract*.'⁴¹

Savigny's theory on legal development enjoyed great popularity, not only domestically but also overseas, even in New York,⁴² by those who, for various reasons, were sceptical of legislative reform and codification.⁴³ Despite this, there were some German jurists, notably Rudolf von Jhering (1818-92), who were not convinced by Savigny's proposition that law develops organically from within outward. Jhering, whose ideas were sometimes 'described by contemporary Germans as German Benthamism',⁴⁴ found that this theory was only applicable to

³⁴ Savigny, *Of the Vocation* 30.

³⁵ *ibid* 22–23; See also Elliott, 'Evolutionary Tradition' 42.

³⁶ Stein, *Roman Law* 126; Vinogradoff, 'Teaching of Sir Henry Maine' 119.

³⁷ Raymond Cocks gives a good account of scientific trend in Victorian legal science: 'Many Victorian lawyers thought that scientific analysis could be used to resolve major legal problems. In the period of 1840 to 1870 writers on law were almost obsessed with scientific analysis although, unfortunately, they defined it in the vaguest terms...Above all, it implied a regard for those who looked beyond the letter of the law and discovered principles which enable the law properly to be categorised and criticised...The law books of the mid-nineteenth century reflected this concern'. Cocks, *Sir Henry Maine* 14–17.

³⁸ *ibid* 17–19; Feaver, *From Status to Contract* 45; Gutteridge, *Comparative Law* 17; Stein, *Legal Evolution* 89.

³⁹ Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 281.

⁴⁰ Maine, *Ancient Law* 113–70. See also Raymond Westbrook, 'The Early History of Law: A Theoretical Essay' (2010) 127 ZRG 1, 3.

⁴¹ Maine, *ibid* 170.

⁴² See Reimann, 'Historical School' 108.

⁴³ Stein, *Roman Law* 117–118. See also Mathias Reimann, 'Nineteenth Century German Legal Science' (1990) 31 Boston Coll LR 837, 858–75.

⁴⁴ Stein, *Legal Evolution* 68.

the legal development in prehistoric societies⁴⁵ and therefore rejected the Historical School's idea of *Volksgeist* as the sole determinant of legal development. The presence of Roman law in the German legal system was clear evidence; Jhering contended that law does not only develop unconsciously out of the national spirit but that its growth is also determined by other factors, namely lawyers' conscious efforts to solve practical problems and by legislation.⁴⁶ For Jhering, legal development also depended on the ability of the people to grasp legal ideas from others.⁴⁷

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.⁴⁸

1.3 The study of legal change in the context of comparative law

The growing trend towards scientific analysis of law during the Victorian era provided fertile ground for the development of comparative law in Great Britain.⁴⁹ Frederick Pollock claimed that the establishment of the Society of Comparative Legislation in Paris and Maine's appointment to the first Professor of Historical and Comparative Jurisprudence at Oxford in 1869 marked the complete recognition of comparative law as a new branch of legal science.⁵⁰ Maine had in fact begun to employ comparative methods even before he took up the Oxford professorship, notably in his *Ancient Law*, where he compared different ancient societies to observe how law developed.⁵¹ Some British scholars of later generations continued using comparative law as an approach to the study of legal change. James Bryce, for example, conducted research on legal development of Roman and English societies

⁴⁵ Rudolf von Jhering, *The Struggle for Law* (John Lalor tr, 2nd edn, Legal Classics Library 1991) 16–17.

⁴⁶ *ibid* 120–21.

⁴⁷ Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol 1 (Breitkopf und Härtel 1874) 7.

⁴⁸ *ibid* 8 cited in Zweigert and Kötz, *Introduction to Comparative Law* 17.

⁴⁹ For more information about Victorian legal science see Cocks, *Sir Henry Maine* 14–17.

⁵⁰ Frederick Pollock, 'The History of Comparative Jurisprudence' (1903) 5 JSCL 74, 86. See also Gutteridge, *Comparative Law* 17. However, Bénédicte Fauvarque-Cosson claims that the First Congress of Comparative Law at Paris in 1900 is symbolically the birth of comparative law as new branch of legal science in its own right. See Bénédicte Fauvarque-Cosson, 'Development of Comparative Law in France' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 36.

⁵¹ L Neville Brown, 'A Century of Comparative Law in England: 1869–1969' (1971) 19 AJCL 232, 232–33; Cairns, 'Development of Comparative Law' 135.

through a comparative method in the early twentieth century.⁵² Bryce strengthened the position of comparative law as a common legal method by claiming that it was one of the four methods commonly employed in legal science, along with ‘the metaphysical method’, ‘the analytical method’ and ‘the historical method’.⁵³ He was one of the earliest British legal comparatists who emphasised the close relationship between the historical and comparative methods; he postulated that ‘for the study of the differences between two systems becomes much more profitable when it is seen how the differences arose, and this can be explained only by social and political history’.⁵⁴ Similarly, Pollock, who was instrumental in the early development of comparative law,⁵⁵ affirmed the interplay between comparative and historical jurisprudence.⁵⁶ He suggests that a comparatist must look into the historical development of the rules compared. ‘What does matter is understanding that comparison of institutions is profitable only when we take account of the stage of civilisation and of special development to which the termed to be compared belong’.⁵⁷

The main purpose of comparative law in early-twentieth-century Great Britain, however, was not to trace the origins and evolution of legal ideas and institutions for advancements in legal science but to serve the practical interests of the nation⁵⁸ as John W Cairns points out that ‘most strands in the early development of British comparative law were closely linked to the experiences and needs of the British Empire’.⁵⁹ Even Maine, who had found fame as a pioneer of the doctrine of legal evolution, admitted that, ‘the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of the law’.⁶⁰ Early British comparatists investigated foreign laws especially in the British colonies so as to discover how they solved similar legal problems and use their findings to improve

⁵² James Bryce, *Studies in History and Jurisprudence* (OUP 1901) 745–81. See also Cairns, ‘Development of Comparative Law’ 135–36.

⁵³ Bryce, *ibid.* 609. He suggests that the historical and comparative methods are of most general practical use. *ibid.* 636.

⁵⁴ *ibid.* 620.

⁵⁵ Brown, ‘Century of Comparative Law’ 234.

⁵⁶ Pollock, ‘History of Comparative Jurisprudence’ 75.

⁵⁷ *ibid.* 76.

⁵⁸ FP Walton, ‘Study of Foreign Laws’ (1934) 46 *Jur Rev.* 1–2.

⁵⁹ Cairns, ‘Development of Comparative Law’ 133. Similarly, Huxley, who studied legal transplants in Burma in the late nineteenth century, submits that ‘the legal transplant scholarship served as propaganda to support the annexation of Upper Burma’. Andrew Huxley, ‘Legal Transplants as Historical Data: Exemplum Birmanicum’ (2009) 37 *JICH* 167, 167.

⁶⁰ Henry Sumner Maine, ‘The Effects of the Observation of India on Modern European Thought’ in *Village-Communities in the East and West: Six Lectures Delivered at Oxford with Additional Addresses* (7th edn, Murray 1907) 4. See also Gutteridge, *Comparative Law* 27.

their own legislation in certain areas.⁶¹ This was confirmed by a number of leading scholars, such as Edward Jenks, who viewed comparative law as a means to achieve practical ends.⁶² A similar assertion was made by Pollock, who said

Probably the earliest form of the comparative study of institutions was the observation that those of another commonwealth were in some way better than one's own, followed by deliberate **imitation** [my emphasis] of them.⁶³

The main purpose of the Society of Comparative Legislation established in 1895,⁶⁴ which was aimed at 'promoting knowledge of the course of legislation in different countries, more particularly in the several parts of her Majesty's Dominions, and in the United States',⁶⁵ is another reflection of the general trend towards the use of comparative law during that period.

1.4 Walton's 'legal transplantation'

Although Bentham's phrase 'transplanting law' seems not to have generated much discussion, the idea of 'legal borrowing' remained of academic interest in comparative law and foreign law in Great Britain between the late nineteenth and early twentieth centuries. However, British comparatists did not discuss it as a main process of legal change, but rather as a principal aim of comparative law. This is illustrated by the above-mentioned remark of Pollock of 1903. There we find the word, 'imitation'.⁶⁶ According to Pollock, early comparative law in Great Britain was aimed at improving legislation, and comparison would lead to 'imitation'.⁶⁷

The most extensive discussion of the notion of borrowing as a process of legal change since Bentham's 'Time and Place' was found in a writing of Frederick Walton (1858-1948), a leading British comparatist. In 1927, Walton published a journal article entitled 'The Historical School of Jurisprudence and Transplantations of Law' ('Transplantations of Law'), which aimed to refute Savigny's theory of *Volksgeist*. He argued that 'a very large and important part of the German law did not grow out of the German people, and does not bear the marks of their national

⁶¹ Cairns, 'Development of Comparative Law' 138-41.

⁶² Edward Jenks, 'On the Study of Comparative Jurisprudence' (1900) 2 JSCL 446, 448. Jenk's book *A Digest of English Civil Law* was used as the source of English private law by Thai draftsmen during the drafting process of the Civil and Commercial Code of 1925.

⁶³ Pollock, 'History of Comparative Jurisprudence' 80.

⁶⁴ Walton, 'Study of Foreign Laws' 1-2.

⁶⁵ 'Statement of the Objects of the Society' (1896-7) 1 JSCL, vi.

⁶⁶ Pollock, 'History of Comparative Jurisprudence' 80.

⁶⁷ *ibid.*

genius, but...grew out of the consciousness of the Roman people, and bears the stamp of the Roman mind'.⁶⁸ Using Egyptian, Japanese and Turkish law codes as case studies, Walton postulated that a legal system of a people does not always grow out of their legal consciousness but can develop out of legal borrowing and sometimes even an entire foreign system can be transplanted.⁶⁹ For Walton

This [was] a new phenomenon in the legal world, It is not the case of a conqueror imposing his laws on a conquered people. Nor it is the case of one country copying a particular rule or a particular piece of legislation which has been found to work well in another place. This kind of legislative borrowing is much commoner than it used to be, but there is nothing shocking about it.⁷⁰

It is interesting to note that Walton used the terms, 'transplantation', 'borrowing' and 'copying' interchangeably to denote legal development by adopting foreign legislation.⁷¹

2. ALAN WATSON'S THEORY OF LEGAL TRANSPLANTS

In 1974, Alan Watson, then Professor of Civil Law at the University of Edinburgh, published a book entitled *Legal Transplants: An Approach to Comparative Law*, which concerned approaches to comparative law, the nature of law and the nature of legal development.⁷² As the title suggests, Watson approached comparative law and the study of legal change through a theory he calls 'legal transplants'. It is not clear whether this book was inspired by Bentham's 'Time and Place' and Walton's 'Transplantations of Law' since Watson never acknowledged any debt to them. Although their ideas on legal borrowing are remarkably similar, Watson deals with the topic more extensively and prolifically. Over the past three decades, in addition

⁶⁸ FP Walton, 'The Historical School of Jurisprudence and Transplantations of Law' (1927) 9 JCLIL 183, 187.

⁶⁹ *ibid* 189.

⁷⁰ *ibid*.

⁷¹ It is worthy of note that Walton's transplantations of law were focused on foreign statutes or legislation. He did not clarify whether customary law or legal principles which were not written down could be transplanted. See Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 86–87.

⁷² A second edition was published in 1993 but the University of Georgia Press. Watson did not change the original text but he added some pages to clarify some issues of his theory. See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974). See also the review of the book by Otto Kahn-Freund, 'Review of *Legal Transplants: An Approach to Comparative Law* by Alan Watson' (1975) 91 LQR 292, 292.

to his 1974 book, he has authored numerous publications in relation to his theory of legal transplants.⁷³ His works, especially on legal change, have sparked fierce controversy among academics in various fields of law. The discussion of legal borrowing which Watson provoked has, however, advanced the study of legal change and comparative legal studies.⁷⁴ Legal transplantation is not only a consequence of comparison as it used to be during Pollock's lifetime, but it is now also regarded as a method of comparative law.⁷⁵

2.1 Aspects of the theory of legal transplants

Watson remarked that 'Comparative Law is about the nature of law, and especially about the nature of legal development.'⁷⁶ This statement summarises what his theory of legal transplants concerns. This author proposes that there are three main aspects to Watson's theory of legal transplants: namely the nature of legal change, the nature of law and the nature of comparative law. These are interrelated.

Watson's views on the nature of law and on the nature of legal change are dealt with together here since in his writing he does not clearly separate them. However, since his critics have tried to guess what he thinks law is, his view on the nature of

⁷³ See Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79; *The Nature of Law* (1977), *Society and Legal Change* (1977), 'Comparative Law and Legal Change' (1978) 37 CLJ 313; 'Two-Tier Law – A New Approach to Law Making' (1978) 27 ICLQ 552; *The Making of the Civil Law* (1981); 'Society's Choice and Legal Change' (1981) 9 Hofstra L Rev 1473; 'Legal Change: Sources of Law and Legal Culture' (1983) 131 U Pa L Rev 1121; *Sources of Law, Legal Change, and Ambiguity* (1984); 'An Approach to Customary Law' (1984) U Ill L Rev 561; 'The Evolution of Law: The Roman Systems of Contracts' (1984) 2 Law&Hist Rev 1; 'The Future of the Common Law Tradition' (1984) 9 Dalhousie LJ 67; *The Evolution of Law* (1985); 'Law in a Reign of Terror' (1985) 3 Law & Hist Rev 163; 'A House of Lords Judgment, and Other Tales of the Absurd' (1985) 33 AJCL 673; 'Legal Evolution and Legislation' (1987) BYU L Rev 353; 'Evolution of Law: Continued' (1988) 5 Law & Hist Rev 537; 'The Structure of Blackstone's Commentaries' (1988) 97 Yale LJ 795; *Failures of the Legal Imagination* (1988); *Legal Origins and Legal Change* (1991); *Roman Law and Comparative Law* (1991); 'From Legal Formants to Legal Transplants' (1995) 43 AJCL 169; 'Aspects of Reception of Law' (1996) 44 AJCL 335; *Ancient Law and Modern Understanding : At the Edges* (1998); *Law out of Context* (2000); 'Legal Transplants and European Private Law' in Jan Smits, *The Contribution of Mixed Legal Systems to European Private Law* (2001); *Legal History and a Common Law for Europe : Mystery, Reality, Imagination* (2001); *Comparative Law: Law, Reality and Society* (2007).

⁷⁴ Graziadei, 'Comparative Law' 442–43; John W Cairns and Olivia F Robinson, 'Introduction' in John W Cairns and Olivia F Robinson (eds), *Critical Studies in Ancient Law, Comparative Law and Legal History* (Hart Publishing 2001) xvii. See also Erin Örüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Kluwer 1999) 7; Frances H Foster, 'American Trust Law in a Chinese Mirror' (2010) 94 Minn L Rev 602, 608.

⁷⁵ See legal transplants and receptions as an approach to comparative law in Graziadei, *ibid* 441–75. Jan Smits believes that the theory of legal transplants is 'one of the most promising ways to establish a European *ius commune*'. Jan Smits, 'On Successful Legal Transplants in a Future *Ius Commune Europaeum*' in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 153

⁷⁶ Watson, *Legal Transplants* 7.

law will be discussed below (2.2 'Responses to Watson's theory of legal transplants').⁷⁷

2.1.1 The nature of legal change

Watson observes legal change in both ancient and modern societies from a historical perspective before concluding that '[m]ost changes in most systems are the result of borrowing'.⁷⁸ The terms 'borrowing' and 'legal transplants' in his publications are interchangeable.⁷⁹ The definition and characters of 'legal transplants' are illustrated by the following quotations from Watson:

[L]egal transplants – the moving of a rule or a system of law from one country to another, or from one people to another – have been common since the earliest recorded history.⁸⁰

[T]he transplanting of individual rules or of a large part of a legal system is extremely common. This is true both of early times – witness the ancient Near East – and the present day.⁸¹

[T]ransplanting is, in fact, the most fertile source of legal development. Most changes in most systems are the result of borrowing... This is so both for individual rules and for systematics as can be seen in the overwhelming importance for the Western world's private law of Roman Civil Law and English Common Law.⁸²

[T]he transplanting of legal rules is socially easy.⁸³

[L]egal rules, in addition to being part of the social structure, also operate on the level of ideas. On this basis law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it. What is borrowed, that is to say, is very often **the idea**. [My emphasis] If this conclusion is accurate then it also follows that the accessibility – for

⁷⁷ p 30 below.

⁷⁸ Watson, *Legal Transplants* 95. See also Alan Watson, *Society and Legal Change* (2nd edn, TU Press 2001) 98; Alan Watson, 'Legal Change: Sources of Law and Legal Culture' (1983) 131 U Pa L Rev 1121, 1146.

⁷⁹ Alan Watson, 'Legal Transplants and European Private Law' in Jan Smits (ed), *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia 2001) 23.

⁸⁰ Watson, *Legal Transplants* 21.

⁸¹ *ibid* 95.

⁸² *ibid*.

⁸³ *ibid* 95.

whatever reason – of the foreign rule will play a considerable role in its influence, and that legal development by transplanting derives from the expertise of the lawyers who know the foreign rule rather than from the common consciousness of society.⁸⁴

Watson's characterisation of transplanting as a change which is socially easy became the centre of a controversy over his theory and provoked the strongest responses from legal scholars, mostly legal sociologists. Watson described the smoothness of the process saying

Whatever opposition there might be from the bar or legislature, it remains true that legal rules move easily and are accepted into the system without too great difficulty. This is so even when the rules come from a very different kind of system.⁸⁵

In 1976, Watson published a journal article entitled 'Legal Transplants and Law Reform' in response to Kahn-Freund's publication, 'On Uses and Misuses of Comparative Law', which was released a few months before Watson's 1974 legal transplants book was published.⁸⁶ Kahn-Freund emphasised the importance of the context of society, especially the political factor, as determinants of successful transplants⁸⁷ saying 'any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection'.⁸⁸ He therefore urges that the use of comparative law for practical purposes must take account of the original context of the law received.⁸⁹ Watson's reaction to Kahn-Freund caused further controversy when he emphasised the insignificant role of external factors for legal transplants. Watson argued that borrowing can be successful even when the legal and political systems and the levels of development of the donor and recipient are very different.⁹⁰

From Watson's quotations mentioned above, we can identify at least four main features of his notion of legal change. First, law changes mostly by borrowing. Second, what is borrowed is a legal idea. Third, legal borrowing is driven by lawyers rather than the common consciousness of society. And, fourth, contextual knowledge of the law received, including a systematic knowledge of it, is not

⁸⁴ Alan Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 315. See Watson, *Legal Origins* 102.

⁸⁵ Watson, *Legal Transplants* 95-96.

⁸⁶ However, the preface of the book is dated June 1973 which suggests that Watson may have finished his manuscript by then.

⁸⁷ O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 6, 12.

⁸⁸ *ibid* 27.

⁸⁹ *ibid*.

⁹⁰ Watson, 'Legal Transplants and Law Reform' 79.

needed for successful borrowing. While the three other features seem to be understandable, Watson's view on the object of borrowing is apparently ambiguous. Watson submits that what is borrowed is often 'the idea'. Unfortunately, he does not clearly explain what 'the idea' is. Despite this, based on his numerous writings on the subject, we have sufficient information to deduce his meaning. Watson emphasises that to search for a legal idea the law reformer does not need a systematic knowledge of the rules borrowed.⁹¹ He later clarifies that his theory of legal transplants focuses on 'positive rules of law'.⁹² If a systematic knowledge of the law is not required to borrow a legal idea, then we can only borrow Friedman's words to conclude that Watson sees 'a legal idea' as 'words sprung out on paper'.⁹³ In other words, Watson seems to suggest that what is borrowed is the wording of the legal rule. This is why for him to frame a single basic code of private law is a relatively easy task.⁹⁴

Because of its simplicity and pragmatism, Watson's theory of legal change appeals to those who seek to explain legal change in developing countries, for example Thailand, between the late nineteenth and early twentieth centuries. On the surface, Watson's theory of legal transplants seems to explain the modernisation of Thai private law accurately.⁹⁵ We will test this hypothesis and will also have a chance to assess critically whether a successful transplant is possible without a systematic knowledge of the foreign law models as he claims.

2.1.2 The nature of comparative law

In accordance with his view on the nature of legal change, namely that law changes mostly by borrowing, Watson contends that the focus of comparative law should be on the historical relationship between the donor and recipient legal systems.⁹⁶

I would suggest that [comparative law] is the study of the relationship of one legal system and its rules with another. The nature of any such relationship, the reasons for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules; hence in the first place, Comparative Law is Legal History concerned with

⁹¹ *ibid.*

⁹² Watson, *Legal Origins* 86–87.

⁹³ Lawrence M Friedman, 'Review of *Society and Legal Change* by Alan Watson' (1979) 6 BJLS 127, 128.

⁹⁴ Watson, *Legal Origins* 100–01.

⁹⁵ How the system of private law in Thailand was modernised is to be discussed in the next chapters.

⁹⁶ Watson, 'Comparative Law and Legal Change' 316.

the relationship between systems...If this approach is right and Comparative Law is best regarded as a study of the relationship between systems of law, then it follows that where there is no relationship there can be no Comparative Law, and any comparison drawn between rules will be arbitrary and without systematic worth.⁹⁷

If law develops mostly through borrowing, one needs to look into the development of the recipient legal system in relation to the donor legal system, i.e. how the law was borrowed. Watson has strengthened the close bond between comparative law and legal history,⁹⁸ which has been upheld by leading comparatists⁹⁹ since it emerged as a new legal discipline. Watson's approach to comparative law is, in my view, convincing, but if to borrow foreign law lawmakers are not required to have contextual knowledge or even a systematic knowledge of it, one may cast doubt on the usefulness of comparative law. On the one hand, Watson insisted that what lawmakers needed to borrow foreign law was 'the idea' of it. On the other hand, he emphasised that legal comparatists needed to study the relationship between the donor system and the recipient system. If legal borrowing occurs simply by copying of legal ideas, comparative law may be of no use to the borrower and if the approach to comparative law is to investigate the relationship of the legal systems historically as Watson suggests, one can expect that to be able to make comparisons comparatists need a systematic knowledge about what they wish to compare and that they will discover something more than how two sets of legal ideas are related.

2.2 Responses to Alan Watson's theory of legal transplants

Watson's theory of legal transplants has both opponents and adherents. Even among the latter, however, it has been criticised for its lack of detail.¹⁰⁰ Since what critics think of his theory sheds light on new aspects of Watson's study of legal change, we will consider their criticism. Responses to Watson's theory of legal transplants are considered in three different aspects: the nature of legal change; the nature of comparative law; and the nature of law.

⁹⁷ Watson, *Legal Transplants* 6–7.

⁹⁸ Kahn-Freund, 'Review' 292. See also William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 AJCL 489, 491.

⁹⁹ See 1.2 'The study of legal change in the context of comparative law' pp 22–24 above.

¹⁰⁰ Kahn-Freund, 'Review' 293–94; Ewald, 'Comparative Jurisprudence II' 491.

2.2.1 The nature of legal change

Most of the criticisms of Watson's theory on legal transplants have been raised by legal sociologists and more generally by those who see law as a reflection of society.¹⁰¹ Critics have focused on his explicit and implicit suggestions that since law changes mainly by borrowing, external factors, for example social, political and economic factors, do not have a significant impact on legal development¹⁰² and are largely directed by legal professional elites, namely lawyers and lawmakers.¹⁰³ Friedman finds the idea of legal transplants, especially as presented in the book, *Society and Legal Change*, unconvincing.¹⁰⁴ He argues that the process of making law which is largely controlled by lawmakers, as suggested by Watson, is political in nature, and therefore successful legislative process depended on political factors.¹⁰⁵ He also argues that law does not survive autonomously but because it remains useful to society.¹⁰⁶

Pierre Legrand, a staunch critic of Watson's theory, finds the metaphor, 'legal transplants', misleading because, in his view, it is not possible for a law to be transplanted.¹⁰⁷ From a sociological standpoint, he argues that 'the meaning of the rule...is not entirely supplied by the rule itself; a rule is never completely self-explanatory'.¹⁰⁸ In fact, it is mostly given by the interpreter in accordance with the way he understands 'the context within which the rule arises and by the manner in which she frames her question'.¹⁰⁹ This process is determined by who and where the interpreter is.¹¹⁰ Of course, 'the context' Legrand mentions is the bundle of external factors which vary from place to place and which influence how the interpreter understands the rule. Hence a legal rule is understood differently in different places.¹¹¹ Watson has defended his position against this criticism in his more recent publications. He announced that he has long held that 'a transplanted rule is not the

¹⁰¹ Friedman, 'Review' 127. See also Lawrence M Friedman, *A History of American Law* (Simon & Schuster 1985) 12.

¹⁰² Watson, *Legal Transplants* 96; Watson, *Society and Legal Change* 98; Alan Watson, *The Evolution of Law* (Blackwell 1985) 119.

¹⁰³ Watson, *Society and Legal Change* 8; Watson, *Legal Origins* 101-02.

¹⁰⁴ Friedman, 'Review of the Book' 127.

¹⁰⁵ *ibid* 129.

¹⁰⁶ *ibid* 127.

¹⁰⁷ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 MJECL 111, 114.

Similarly, Legrand opposed the unification of European private law. See also Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 ICLQ 52-81; Pierre Legrand, 'Against a European Civil Code' (1997) 60 MLR 44.

¹⁰⁸ Legrand, *Impossibility* 114.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

¹¹¹ *ibid* 120.

same thing as it was in its previous home.¹¹² One may consider this as a change of position. If this is not the case, then there must be some ambiguity in his early works. For example, he wrote that '[o]ne of the most striking features of legal rules is their power of survival' and '[m]any, many rules endure for centuries with only minor modifications, both in their own land and abroad'.¹¹³ These statements imply that the rules Watson refers to whether in their own land or abroad are the same rules.

Legrand is not the only one who finds the metaphor of legal transplants misleading. Gunther Teubner proposed another term and conception, 'legal irritants', which he claimed explained legal change by borrowing more accurately and which is more plausible than suggesting that legal transplants are always impossible.¹¹⁴ For Teubner, 'legal transplants' gives the wrong impression that what is borrowed remains identical with the rule used as its model and has the same function. In fact, '[i]t is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events',¹¹⁵ furthermore

'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.¹¹⁶

Teubner's theory does not focus on the question of legal borrowing as to whether the law borrowed is rejected or integrated in society but on the question as to 'what kind of transformations of meaning will the term undergo, how its role [will] differ, once it is reconstructed anew under [the new environment]?'¹¹⁷ He studied the reception of the German concept of good faith in English law¹¹⁸ and discovered that it does not perform the same function as it does in German law because of differences between Germany's and Great Britain's economic cultures.¹¹⁹

¹¹² Watson, 'Legal Transplants and European Private Law' 16. See also Alan Watson, *Law Out of Context* (UGA Press 2000) 1.

¹¹³ Watson, *Society and Legal Change* 8.

¹¹⁴ Smits, 'On Successful Legal Transplants' 144.

¹¹⁵ Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' (1998) 61 MLR 11, 12.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ In his article, Teubner used the term 'British law'.

¹¹⁹ Teubner, 'Legal Irritants' 25–27.

Teubner analyses three aspects of Watson's theory and offers new explanations for them. First, legal borrowing is socially easy because of globalisation which 'created one world-wide network of legal communications which downgrades the law of the nation state to mere regional parts of this network'.¹²⁰ A legal transfer is therefore no longer a matter of an interrelation of national societies but 'a direct contact between legal orders within one global legal discourse'.¹²¹ Despite this, it does not necessarily mean that the cultural ties of the national laws can simply be overlooked. Second, lawyers and lawmakers are regarded as 'secondary' actors since 'the inner logics of the legal discourse itself...builds on normative self-reference and recursivity and thus creates a preference for internal transfer within the global legal system as opposed to the difficult new invention of legal rules out of social issues'.¹²² Third, legal borrowing is only one of the main forms of legal change and others may result from complex multi-layered interrelations between law and society.¹²³

Some other concerns of legal sociologists revolve around the same issues, including Watson's emphasis on lawyers' roles in legal development and his trivialising of external factors. Even though they do not completely reject this idea, most of them find that Watson's explanation is incomplete and does not represent the whole picture of legal change. Bruce Frier opines that Watson's theory focuses on private law and neglects other areas of law, for example, criminal law and constitutional law, which have more interrelations with social needs. He also criticises Watson for limiting his examples to particular places and times while ignoring others, for example the era of legislation.¹²⁴ William Ewald, although supportive of much of the idea of legal transplants,¹²⁵ asks Watson to supply evidence for his claim that the interests of other sections of society have no significant impact on legal development.¹²⁶ Roger Cotterrell acknowledges that the view on lawyers and lawmakers' crucial role in legal change is plausible but only when the complexity of the relationship between law and society has been understood sociologically.¹²⁷

¹²⁰ *ibid* 16.

¹²¹ *ibid*.

¹²² *ibid*.

¹²³ *ibid* 16-17.

¹²⁴ Bruce W Frier, 'Why Law Changes' (1986) 86 Col LR 888, 892.

¹²⁵ Cotterrell speculates that Ewald attempts to justify Watson's theory of legal transplants. See Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 71-72.

¹²⁶ Ewald, 'Comparative Jurisprudence II' 507.

¹²⁷ Cotterrell, 'Is There a Logic of Legal Transplants?' 90.

2.2.2 The nature of law

Through his statement '[c]omparative Law is about the nature of law, and especially about the nature of legal development',¹²⁸ we can assume that Watson sees the nature of legal change as part of the nature of law. It is reasonable to believe that his critics also agree with this assumption since they usually interpret his view on the nature of legal change as his view on the nature of law simultaneously even though in dealing with his theory of legal transplants he never reveals what he thinks law is. Criticism may to a degree result from Watson's view on what is borrowed in which he seems to suggest that the object of borrowing is the wording of the legal rule.¹²⁹ Friedman considers Watson's theory of legal transplants as weak because it is founded on a narrow concept of the nature of law since '[f]or Watson, a rule means words sprung out on paper, not a living process. Words on paper may indeed have little connection with society; the important question is how they operate'.¹³⁰ Similarly, Legrand interprets Watson's object of borrowing as 'statutory rules' mainly because of his proposition that legal borrowing is socially easy.¹³¹ Legrand sees the legal transplants theory as promoting legal positivism.¹³² Examining Watson's legal transplant examples of the imposition of foreign law in former colonial states in Africa,¹³³ Richard Abel goes further to accuse him of having a hidden political agenda. 'Watson consistently conceals the political element in his statements of and explanations for such phenomena as the English conveyancing rules and the imposition and preservation of metropolitan law in the colonies'.¹³⁴

Watson later clarifies the subject of his studies of legal transplants that they are 'primarily concerned with positive rules of law'.¹³⁵ The fact that he concentrated his studies of legal change on positive law does not necessarily mean that for him law is only a set of positive rules and that he is a legal positivist. The question is only whether the scope of a study of legal change should be limited to positive rules of law or not.

¹²⁸ Watson, *Legal Transplants* 7.

¹²⁹ See 2.1.1 'The nature of legal change' p 27 above.

¹³⁰ Friedman, 'Review' 128.

¹³¹ Legrand, 'Impossibility' 112.

¹³² *ibid* 122. Joachim Zekoll also considers Watson's theory to have represented a positivistic view. See Joachim Zekoll, 'Kant and Comparative Law - Some Reflections on a Reform Effort' (1996) 70 Tul L Rev 2719, 2747.

¹³³ Watson, *Society and Legal Change* 104–05.

¹³⁴ Richard L Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 Mich L Rev 785, 803.

¹³⁵ Watson, *Legal Origins* 86–87.

2.2.3 The nature of comparative law

Watson has great faith in a unified method of comparative law and legal history for understanding legal development.¹³⁶ But since his theory of legal transplants underplays the role of society, legal sociologists suspect that he is also attempting to make sociology of law an irrelevant method for the study of legal change.¹³⁷ There is no doubt that they find legal sociology an indispensable approach in conjunction with comparative law and legal history to the study of legal change. Cotterrell sees comparative law and sociology of law as a single enterprise committed to understanding law as a social phenomenon.¹³⁸ Abel contends that comparative law and legal history should not be limited to doctrinal analysis of positive law since '[s]tudies using historical and comparative materials to construct a social theory of when and why legal rules are preserved under changed social conditions, and assessing that persistence in terms of explicitly stated values, would be a major contribution'.¹³⁹ Frier suggests that legal history is fully exploited when the researcher takes account of 'the dynamic tension between the jurisprudential tradition and the social purposiveness of law, between internal and external factors affecting legal change'.¹⁴⁰

Rudolfo Sacco, a renowned comparatist, published two instalments of a journal article entitled 'Legal Formants: A Dynamic Approach to Comparative Law' in 1991.¹⁴¹ Sacco developed a new theory on comparative law methods which also provides an interesting perspective on the study of legal change. It is not clear whether Sacco's publication is aimed at challenging Watson's approach to comparative law, but it has often been used in contrast to his theory of legal transplants.¹⁴² Watson wrote a paper to acknowledge 'legal formants' implicitly but mainly to defend his argument that legal development can be distant from social reality.¹⁴³ Sacco offers a new approach to understanding the nature of law. He contends that a legal rule of a country should not be thought of merely as a

¹³⁶ See 2.1.2 'The nature of comparative law' p 29 above.

¹³⁷ Cotterrell, 'Is There a Logic of Legal Transplants?' 76.

¹³⁸ *ibid.*

¹³⁹ Abel, 'Law as Lag' 808–09.

¹⁴⁰ Frier, 'Why Law Changes' 900.

¹⁴¹ See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 AJCL 1–34; Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 AJCL 343–401.

¹⁴² See eg Gianmaria Ajani, 'Transplants, Legal Borrowings, and Reception' in David Clark (ed), *Encyclopedia of Law and Society: American and Global Perspectives*, vol 3 (Sage Publications 2007) 1508; Cotterrell, 'Is There a Logic of Legal Transplants?' 76; PG Monateri, 'The Weak Law: Contaminations and Legal Cultures' (2003) 13 *Transnat'l L & Contemp Probs* 575, 582.

¹⁴³ Alan Watson, 'From Legal Transplants to Legal Formants' (1995) 43 AJCL 469, 469.

statutory rule but can be any of its three aspects, the rules of legislatures, the rules of courts or the rules of the scholars who formulate legal doctrine.¹⁴⁴ Thus when borrowing a legal rule, the borrower must take account of these three different elements which have the same root but which may offer different meaning or understanding of it as a result of the process of interpretation.¹⁴⁵ Comparative law should not be used to reject this difference but to admit that it exists because of the multiplicity of the legal formants. Hence when comparing legal systems, we must look for their differences and similarities in all three dimensions.¹⁴⁶ Sacco postulates that recognising legal formants acknowledges that 'the comparative perspective is historical per excellence' that comparison looks to history to find, for example, why a law is understood differently by a judge and by a scholar.¹⁴⁷

3. SUCCESS OF RECEPTIONS

Even though Watson places more emphasis on how law changes than how success of legal change is perceived, this does not necessarily mean that the latter is not an important aspect of the study of legal change. It may be true that law develops mostly by borrowing as Watson speculates, but questions about legal change should not be confined to how law is borrowed. It is also equally important to ask how the law borrowed has developed subsequently. In other words, it is essential to enquire whether legal borrowing is successful.¹⁴⁸ This is because effectiveness of the law borrowed usually matters to the borrower even though the law was borrowed on certain purposes and they were fulfilled. In Thailand, for instance, the Civil and Commercial Code of 1923 compiled mainly by French draftsmen was soon rejected because the Thai government and lawyers were not satisfied with its quality, even though the main purpose of having a code which was to end extraterritoriality

¹⁴⁴ Sacco, 'Legal Formants I' 21.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid* 23-24.

¹⁴⁷ *ibid* 24-25.

¹⁴⁸ See John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Mauro Cappelletti, *New Perspectives for a Common Law of Europe* (Badia Fiesolana 1978) 209; David Nelken, 'The Meaning of Success in Transnational Legal Transfers' (2001) 19 Windsor YB Access Just 349, 349; JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public law* (Clarendon Press 1996) 15; Roger Cotterrell, 'Is There a Logic of Legal Transplants?' 79; Mindy Chen-Wishart, 'Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding' (2013) 62 ICLQ 1, 27.

could have been fulfilled by the French draft.¹⁴⁹ Since the discussion of legal reception of this thesis revolves around his theory of legal transplants, Watson's perception of successful receptions is first examined before factors of success of receptions are generally discussed.

3.1 Alan Watson's notion of successful legal transplants

Watson does not clearly explain when and how a legal transplant can be treated as 'successful'.¹⁵⁰ His legal transplant theory mainly concerns how legal borrowing occurs¹⁵¹ and how its developments can be said to be independent of social factors. Watson admits that what happens after borrowing, i.e. how it has developed or interpreted by scholars and judges, is not the main concern for his theory of legal transplants.¹⁵² His unclear position on success of receptions and disregard for the effects of receptions is criticised by JWF Allison, who contends that '[w]ithout a study of effect or interpretation...one cannot draw inferences concerning the success of transplantation'.¹⁵³ Similarly, Cotterrell argues that the study of a legal transplant is of no significance unless one can show how it has affected society.¹⁵⁴

Despite the absence of clear definition of the term 'success', Watson's works on the theory of legal transplants provide sufficient clues about how he conceives of 'success'. Watson explains that the focus of his 'legal transplants' is on 'the existence of the rule'.¹⁵⁵ His proof for the weak relation between law and society is the 'power of survival' of legal rules that 'many rules endure for centuries with only minor modifications, both in their own land and abroad'.¹⁵⁶ The clearest illustration of Watson's notion of 'success' is his example of the reception of foreign civil law in Japan. Watson views the reception of foreign civil law in Japan as a successful legal transplant:

¹⁴⁹ See ch 2, 3.3 'Codification of civil and commercial law in Thailand' p 81 below.

¹⁵⁰ See Smits, 'On Successful Legal Transplants' 140.

¹⁵¹ Nelken, 'Meaning of Success' 352.

¹⁵² Watson, *Legal Transplants* 20.

¹⁵³ Allison, *Continental Distinction in the Common Law* 15.

¹⁵⁴ Cotterrell, 'Is There a Logic of Legal Transplants?' 79.

¹⁵⁵ Watson, *Legal Transplants* 20.

¹⁵⁶ Watson, *Society and Legal Change* 8.

What counted for the speedy **success** [my emphasis] of this transplant in general was the Japanese desire for it, not their knowledge of the French and German political context of the legal rules, or any similarity of that political context with what existed in Japan.¹⁵⁷

From his propositions, we can construct Watson's conception of a successful legal transplant and the determinant of this success. It is most likely that for Watson legal borrowing is successful if the law borrowed survives for a period of time. The determinant of success is therefore the 'survival' or 'existence' of the law transplanted. However, this notion of survival is disapproved of by Friedman, who questions as to how we can determine when a legal rule survives or dies out. He is not convinced that a legal rule can survive by itself. Taking the mortgage and the trust as examples, Friedman concludes that while other medieval legal rules became extinct the two concepts have survived because they have remained useful to society.¹⁵⁸ Friedman's argument has some merit at least in that there should be a more objective assessment of the success of a legal transplant than a focus on whether the adopted rules exist or not. The survival of a law ultimately depends on government bodies which hold the power to abolish it. A more meaningful question is about what determines that the law should no longer exist. Friedman has a point, but the retention or abolition of a law may also involve wider and more complex reasons than its usefulness to society.

A weakness of Watson's theory of legal transplants, if not the absence of a clear definition of success as discussed above, is that it places too much emphasis on the occurrence of a reception of law but too little on the success of it. It may be more worthwhile for those who hold Watson's view that legal borrowing is the main source for legal change to change the question from 'whether' to 'how the law was borrowed'.¹⁵⁹ Moreover, it is a more meaningful question to ask how the legal rules have developed after they were transplanted into society, i.e. whether they have been fully incorporated into the new environment. To answer this question, a unified approach of comparative law and legal history must be adopted. However, to have a full picture, one also needs to see legal development from sociological perspective.

¹⁵⁷ Watson, 'Legal Transplants and Law Reform' 83.

¹⁵⁸ Friedmann, 'Review' 128.

¹⁵⁹ Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 AJCL 163, 189.

3.2 Factors of success of receptions

Defining the success of receptions is often controversial, and this is why academics usually avoid giving a precise definition for the term 'success'.¹⁶⁰ They attempt instead to establish the criteria for success of a reception. But this still does not escape controversy.¹⁶¹ The criteria of success may depend on the aims of the reception, which possibly results in various subjective assessments. However, if everyone agrees that the main aim of receptions of foreign law is to successfully establish a law based on the texts of the rules adopted, then the only criterion is to examine whether the law is promulgated by a legitimate legislative body. This is a less controversial meaning of success, but one may argue that it is too simplistic. Similarly, if we measure the success of a reception by looking at the survival of the rules adopted,¹⁶² most receptions of law may be considered to be successful transplants at least for a certain period of time. Watson's survival consideration, though simplistic, offers certainty. We may adopt it but find a more sophisticated explanation for it, which may not necessarily lessen the degree of controversy. If we generally agree that we borrow foreign legal rules mainly because we appreciate their underlying principles and wish to establish our own rules based on the reasoning of the rule in question,¹⁶³ we may consider our aim achieved when they are understood and applied by our lawyers, including judges and scholars, in a way similar as their models are in their home for a certain period of time. It is equally important that the rules must be incorporated into the new environment.¹⁶⁴ If the rule survives for a significant period of time one may assume that it has been incorporated into society. However, this is not always true as there may be some adopted rules which are struggling to survive but are still in use. Thus one needs to consider both internal and external factors of success.¹⁶⁵ Internal factors concern lawmakers and lawyers who must possess knowledge of the rules, transplant them properly and apply them in accordance with jurisprudence of the original system.

¹⁶⁰ Nelken, 'Meaning of Success' 350, 362.

¹⁶¹ William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 J Legal Pluralism & Unofficial L 1, 16.

¹⁶² *ibid.*

¹⁶³ Under some circumstances, a country adopts a set of foreign rules not because of their prestige but because of its commitment to fulfilment of certain conditions, for example a condition imposed by the IMF in exchange for financial support. In this case, the criteria for assessing success of the legal transplants are normally set out. See Graziadei, 'Comparative Law' 459–60; Berkowitz, Pistor, and Richard, 'Transplant Effect' 163–203; Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 EER 165–95.

¹⁶⁴ Nelken, 'Meaning of Success' 352.

¹⁶⁵ Frier, 'Why Law Changes' 900.

Regarding external factors, the rules must be incorporated into society, which depends mainly on what caused the reception of law, what was received and the context of the new environment.

3.2.1 Internal factors

In the discussion of Watson's theory of legal transplants, the internal factors usually referred to are a class of lawmakers and lawyers, including judges and scholars, who dominate the making, application and interpretation of law.¹⁶⁶ Watson has illustrated how significant this professional group is for legal development.¹⁶⁷

Cairns, who undertook extensive PhD research into codifications in the Territory of Orleans and Province of Lower Canada under Watson's supervision, confirms his supervisor's proposition that external pressure must be exerted on lawyers and lawmakers.

A change in economic organisation or ideology (in itself a human construction) does not in itself cause a change in the law: a lawmaker has to see the change and then act to change the law because of the change in the economy. (Law is not a self-perpetuating living body: it only exists through human actions.)¹⁶⁸

Cairns concludes that lawmakers act as 'mediators' between 'society' and 'law'.¹⁶⁹

The relationship of causality between all the factors potentially influencing law and the law itself is dependent on those who make the law: it is they who make these various factors effective on the law in their construction of the law.¹⁷⁰

The central role of lawyers and lawmakers in legal development is not contentious. The true question is about what kind of knowledge these people needed to have to make legal borrowing successful. Watson's position on this question generates controversy. He insists that:

¹⁶⁶ Friedman, *Legal System* 270.

¹⁶⁷ See 2.1 'Aspects of the theory of legal transplants' p 26 above.

¹⁶⁸ John W Cairns, 'The 1808 Digest of Orleans and 1866 Civil Code of Lower Canada: An Historical Study of Legal Change' (PhD Thesis, University of Edinburgh 1980) 736.

¹⁶⁹ *ibid* 735.

¹⁷⁰ *ibid*.

What ... the law reformer should be after in looking at foreign systems was an idea which could be transformed into part of the law of his country. For this a **systematic knowledge of the law** or political structure of the donor system **was not necessary**, [my emphasis] though a law reformer with such knowledge would be more efficient. Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law.¹⁷¹

It is understandable that Watson downplays the importance of social, political and economic knowledge of the donor system because of his view that legal development is mostly distinct from social reality, but without 'a systematic knowledge of the law' one has considerable doubts as to how a legal transplant can be successful. Of course, if one adheres to his disputed notion of success, one may be convinced that as long as the lawmakers can borrow legal ideas and they survive in the new environment, any kind of knowledge is not necessary.

If we look at the German situation, we find 'learned men', those who studied Roman law as the driving force behind the reception of Roman law. However, legal borrowing in Germany was not merely a process of borrowing positive Roman rules but what Franz Wieacker calls the '*intellectualization* of German law and lawyers'.

If one is to see the Reception in its full historical significance it is better to concentrate less on the adoption of the actual rules of the *ius commune* and more on the main process of development, namely on the *intellectualization* of German law and lawyers. By this we mean the rationalization of the whole of public life, the resolution of political and private disputes, not by force, emotion, or unthinking deference to tradition but by canvassing the solution reached by independent juristic analysis of similar problems and deciding on the basis of a rational rule thus arrived at.¹⁷²

It was those learned men who spread Roman legal ideas in German society and helped foster the intellectual climate and thereby made it ready for the subsequent receptions of substantive Roman rules in Germany. One may doubt whether the reception of Roman law in German law would have still been successful if those German men had not possessed 'a systematic knowledge' of Roman law.

It is convincing that, if they want the legal ideas to be understood in similar ways as they were in their home jurisdiction, lawmakers need to make the new environment intellectually suitable for them to grow, and they therefore need to pay close attention to legal education. Kurt Lipstein analysed the reception of the Swiss Civil Code in Turkey in 1926 and found that, despite conflicting cultural traditions

¹⁷¹ Watson, 'Legal Transplants and Law Reform' 79.

¹⁷² Wieacker, *History of Private Law* 95. See also Max Rheinstein, 'Types of Reception' (1956) 6 *Annales de la Faculté de Droit d'Istanbul* 31, 32.

of Switzerland and Turkey, owing to education and organisation, Swiss civil law was transplanted in Turkey more smoothly than many envisaged for

If a small but leading intelligentsia, which is united in its purpose, introduces a new system of values and behavior among a population which is little educated, the cleavage between law on the one side and custom, traditions, and morality on the other side can be overcome and the law emerges victorious. The problem is reduced to one of organization and education.¹⁷³

From these illustrations, we may conclude that if legal borrowing is to be successful lawyers need adequate legal education¹⁷⁴ which enables them to transplant, understand and apply the rules borrowed properly. It follows that lawyers without a systematic knowledge of the rules transplanted tend to apply them in a way they are familiar with but not in a way they are understood at their home jurisdiction.

3.2.2 External factors

Lawyers with sufficient knowledge of law are not the only determinant for successful receptions. They may know how to apply it, but this does not necessarily guarantee that the transplanted law can successfully be incorporated into their society. If it fails to be absorbed into society, the transplant may cease to exist or cause problems. Thus we need to examine the external forces which affect the incorporation of the law transplanted into society.¹⁷⁵ Regarding the external factors of a successful transplant, David Nelken points out that

We must be prepared to find that the conditions of success will depend on what is being transferred, by which source, to which receiving society, the way the transfer is introduced, and a potentially unlimited number of wider background factors and previous historical experiences.¹⁷⁶

¹⁷³ K Lipstein, 'Conclusions' (1957) 9 Int Soc Sci Bull 70, 80.

¹⁷⁴ See Cotterrell, 'Is There a Logic of Legal Transplants?' 80.

¹⁷⁵ See Edward M Wise, 'The Transplant of Legal Patterns' (1990) 38 AJCL 1, 22; Frier, 'Why Law Changes' 900; Esin Öricü, 'Mixed and Mixing Systems: A Conceptual Search' in Esin Öricü and others (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer 1996) 335; Eric Stein, 'Uses, Misuses – and Nonuses of Comparative Law' (1977-78) 72 Nw U L Rev 198, 206-08.

¹⁷⁶ Nelken, 'Meaning of Success' 354.

To identify all the external determinants of success is, as Cairns puts it, 'impossible'.¹⁷⁷ One rather focuses on some important factors which have often been discussed among legal scholars in relation to Watson's theory of legal transplants.

Causes of receptions

There are many factors which lead to or trigger receptions of law. These factors can also be called 'causes of receptions' or 'motivations of receptions' and used to establish 'types of receptions'. What causes or motivates a successful reception may also determine how smoothly the law has been incorporated into society.¹⁷⁸

Generally, there are two main types of reception, reception by imposition and reception because of prestige. The first type is exemplified by the imposition of law in colonies by colonial powers while the receptions in the second type take place because the recipient state appreciates foreign law.¹⁷⁹ In terms of the recipient state's willingness to receive foreign law, we can also call the first and the second types of receptions, involuntary and voluntary receptions. There can be another type of receptions where legal borrowing occurs because a state has made a commitment to an adoption of foreign law. It is indeterminate whether the recipient country is willing to borrow foreign law. This can be illustrated by law reform programmes in developing countries which are undertaken to fulfil a condition set by the IMF or the World Bank in exchange for financial support.¹⁸⁰ The reception of foreign private law in Thailand's Civil and Commercial Code of 1925 may also be included in this category given that the country had to establish modern codes of law in order to be freed from consular jurisdictions. It is clear that none of the colonial powers forced Thailand to do so, but one cannot entirely be sure that the modernisation of Thai law took place because of the Thai attribution to prestige of foreign law.¹⁸¹

An implication of the causes of receptions for their success is that 'in contrast to prestige, dominance does not produce spontaneous adherence to cultural models'.¹⁸² Since it naturally relies on the use of force, dominance usually

¹⁷⁷ Cairns, '1808 Digest of Orleans' 735.

¹⁷⁸ Albert Kocourek, 'Factors in the Reception of Law' (1935) 10 Tul L Rev 209, 209; Rheinstein, 'Types of Reception' 35–36; Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' (2003) 51 AJCL 839, 843.

¹⁷⁹ Graziadei, 'Comparative Law' 456–58.

¹⁸⁰ *ibid* 459.

¹⁸¹ This will be discussed in greater detail in the next chapter.

¹⁸² Graziadei, 'Comparative Law' 458. See also Kocourek, 'Factors' 211. In his studies of Legal Transplants in Russia and Eastern Europe, Gianmaria Ajani concluded that '[p]restige and political opportunity together encourage the spread of models developed by the EU

disappears when the occupation ends.¹⁸³ It follows that the reception of foreign law will fail except when the law has already been incorporated into the new environment due to 'the rational authority of the legal system or local lobbies'.¹⁸⁴ Max Rheinstein observes that '[i]n the case of [voluntary] reception we find two legal climates, that of the model and that of the recipient, and certain legal phenomena of the model are voluntarily and consciously taken over into the legal climate of the recipient'.¹⁸⁵

What is received

The success of a legal transplant may also depend on the degree of transferability of the rules. These give a clue 'what chance there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected'.¹⁸⁶ The transferability of legal rules can be identified only when one views the nature of law as 'a multilayered cultural interfusion of great complexity and variability, an amalgam of group processes, historical and social, intellectual and psychological'.¹⁸⁷ Kahn-Freund postulates that legal rules are ranged from the mechanical which can be transplanted with relative ease to the organic which can be transplanted with difficulty.¹⁸⁸ Based on Kahn-Freund's notion of transferability of legal rules, Teubner developed his own theory called 'law's binding arrangements'.¹⁸⁹ He submits that legal rules and social processes are coupled either loosely or tightly and then concludes that the loosely coupled areas of law have a relatively high chance of successful transfer while a transfer of legal rules with tight coupling in binding arrangements have a relatively high chance of failure.¹⁹⁰ Similarly, Cotterrell contends that we should 'see law as always rooted in communities of various kinds'.¹⁹¹ Law can broadly be separated into two main types, 'instrumental law' and 'culturally-based law', each of which has different transferability. Instrumental laws, especially contract and commercial law, are relatively easy to be transplanted

within the whole Central and Eastern Europe...In some cases those models can be directly transplanted, without much modification'. Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) 43 AJCL 93, 115.

¹⁸³ Graziadei, *ibid*; Miller, 'Typology' 868; Smits, 'On Successful Legal Transplants' 142.

¹⁸⁴ Miller, *ibid*.

¹⁸⁵ Rheinstein, 'Types of Reception' 36.

¹⁸⁶ Kahn-Freund, 'On Uses' 6.

¹⁸⁷ Wieacker, *History of Private Law* 93. See also Legrand, 'Impossibility' 116.

¹⁸⁸ Kahn-Freund, 'On Uses' 6.

¹⁸⁹ Teubner, 'Legal Irritants' 17-18.

¹⁹⁰ *ibid* 18-19.

¹⁹¹ Cotterrell, 'Is There a Logic of Legal Transplants?' 80.

because of their 'tie to economic interests rather than national customs or sentiments'¹⁹² while culturally-based law is relatively easy to resist in the new environment.¹⁹³ This can be illustrated by property law which 'is deeply rooted in locally developed legal traditions'.¹⁹⁴

Watson believes that legal transplants are socially easy since he concentrates his attention exclusively on private law where transfer has a relatively high chance of success. It is therefore doubtful whether he would change his position if he extends his case studies to criminal law or constitutional law which is tightly coupled with social needs.¹⁹⁵

The context of the recipient society

This external factor is closely related to what is received as discussed above. While the success of transplants may be determined by how strong the link between the law and its home society was, in this section we will examine how suitable the new environment is for the growth of the law received. Thus the compatibility between the law and the new home depends on both the degree of transferability of the law and the suitability of the new home.¹⁹⁶ The context of society here is mainly concerned with social, political and economic conditions of recipient society.¹⁹⁷ The significance of these aspects has consistently been stressed by legal sociologists when it comes to an issue of legal transplants.

Cotterrell, who for the purpose of determining success of receptions divides community¹⁹⁸ into four types, 'instrumental community', 'traditional community',

¹⁹² *ibid* 81-82. See also Smits, 'On Successful Legal Transplants' 146-47. See a discussion on the possibility of making successful commercial law transplants in Nicholas Foster, 'Transmigration and Transferability of Commercial Law in a Globalized World' in Andrew Harding and Esin Örüçü (eds), *Comparative Law in the 21st Century* (Kluwer 2002).

¹⁹³ Cotterrell, *ibid* 81.

¹⁹⁴ A Gambaro, 'Perspectives on the Codification of the Law of Property: An Overview' (1997) 5 ERPL 497, 497. See also Smits, 'On Successful Legal Transplants' 147.

¹⁹⁵ Frier, 'Why Law Changes' 892.

¹⁹⁶ Kahn-Freund, 'On Uses' 12-13. See also Smits, 'On Successful Legal Transplants' 146.

¹⁹⁷ Harry Willekens observed that the development of family law in Western Europe was driven by social and economic change. Harry Willekens, 'Explaining Two Hundred Years of Family Law in Western Europe', in Harry Willekens (ed) *Het gezinsrecht in de sociale wetenschappen*, (Vuga uitgeverij BV 1997) 59. See also David Bradley 'Convergence in Family Law: Mirrors, Transplants and Political Economy' (2001) Oxford U Comparative L Forum 2 <<http://ouclf.iuscomp.org/articles/bradley.shtml#fn167anc>> accessed 10 March 2013.

¹⁹⁸ The term 'community' has replaced the term 'society' in legal sociology because as Cotterrell points out 'its use may be one way of escaping from the modern intertwining of the concept of society (as political society) with that of the state'. Cotterrell 'Legal Concept of Community' 78.

‘community of belief’ and ‘affective community’,¹⁹⁹ shows that each type of society provides different conditions for the development of the law received and therefore will respond to each type of law differently.

This abstract framework of types of community does not allow any neat classification of laws as hard or easy to transplant. But it provides possibilities for linking law to different kinds of need and problems associated with different kinds of social relationships. Certainly, when laws are transplanted, the transplant is likely to be linked in the perceptions of the transplants with patterns of social relations they associate with the law.²⁰⁰

The formation of an instrumental community is mainly based on people’s common interest, especially economic interest.²⁰¹ Foreign law does not encounter strong resistance in this type of community as long as it serves its purposes.²⁰² Similarly, a traditional community where people find themselves often by chance coexisting in a shared an environment,²⁰³ provides a suitable environment for foreign law to grow due to its relatively weak social ties.²⁰⁴ However, an affective community where people unite by their mutual affection and community of belief where people share common beliefs or values²⁰⁵ resists any law which contrasts with its common social values or beliefs.²⁰⁶

Teubner’s case study of the reception of the German concept of good faith in Great Britain shows that it did not grow in the same way it did in Germany. This is because the concept of good faith has been used to facilitate and support the German economic system, which is based on business-coordinated economies and therefore does not perform the same function in the British economic environment, which is based on liberal market economies.²⁰⁷ In Cotterrell’s terms, the legal concept does not satisfy the needs of instrumental community, British business community,²⁰⁸ and, in Teubner’s terms, the concept of good faith therefore becomes a legal irritant to the British legal system, which changes its binding arrangement fundamentally. ‘Good faith would become a quasi-constitutional constraint on two central elements of the production regime: a constraint on strong hierarchies of

¹⁹⁹ Cotterrell, ‘Is There a Logic of Legal Transplants?’ 82. See also Cotterrell, *ibid* 80–81.

²⁰⁰ Cotterrell, ‘Is There a Logic of Legal Transplants?’ 83.

²⁰¹ *ibid* 84; Cotterrell, ‘Legal Concept of Community’ 80.

²⁰² Cotterrell, ‘Is There a Logic of Legal Transplants?’ 87.

²⁰³ Cotterrell, ‘Legal Concept of Community’ 80.

²⁰⁴ Cotterrell, ‘Is There a Logic of Legal Transplants?’ 87.

²⁰⁵ Cotterrell, ‘Legal Concept of Community’ 80.

²⁰⁶ Cotterrell, ‘Is There a Logic of Legal Transplants?’ 87.

²⁰⁷ Teubner, ‘Legal Irritants’ 25–26.

²⁰⁸ Cotterrell, ‘Is There a Logic of Legal Transplants?’ 84.

private government and a constraint on certain expansionist tendencies of competitive processes'.²⁰⁹ Ugo Mattei, who claims that, despite a diversity of institutional backgrounds, modern legal systems tend to move towards economic efficiency,²¹⁰ similarly admits that despite economic efficiency the legal systems may sometimes develop 'strong barriers' to transplantation for various reasons.²¹¹

The political condition of the new environment is another important factor which determines whether the new law has successfully been absorbed into the new environment. Kocourek defines the political factor as 'the objective complex of governmental arrangements in a State, and more particularly, the nature of the sources of law, organization of courts, and the activity of legislative power'.²¹² Kahn-Freund suggests that political structure and the influence of social groups in society 'play a decisive role in the law making and the decision making process'.²¹³ Watson was criticised because he failed to take account of the complexity of the modern legislative process.²¹⁴ This criticism has some merit in the sense that the making of a law is no longer a matter for ruling elites or a small group of lawmakers and lawyers as it was some hundred years ago. In the modern democratic world, more political actors play crucial roles in legal development. Friedman illustrates how the legislature works as a rulemaking body in the United States, which reflects complex political structure and relationship between political actors. American legislators therefore need to ensure that a statute keeps balance between public interest and groups' interest.²¹⁵

The significance of the political factor in the reception of law and its success can also be illustrated by codification in Thailand where under intense external political pressure the Thai government had to end consular jurisdictions speedily. Of course, as Cairns points out,²¹⁶ this external factor may not directly affect the success of the reception of law in Thailand, but making a law under such political condition, the Thai lawmakers may have been forced to adopt a method which may have greatly affected the way the law has developed. How the political factor caused the reception of foreign private law in Thailand and how it indirectly

²⁰⁹ Teubner, 'Legal Irritants' 28.

²¹⁰ Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 IRLE 3, 8.

²¹¹ *ibid* 16.

²¹² Kocourek, 'Factors' 220.

²¹³ Kahn-Freund, 'On Uses' 13.

²¹⁴ Frier, 'Why Law Changes' 892.

²¹⁵ Lawrence M Friedman, 'Legal Rules and the Process of Social Change' (1967) 19 Stan LR 786, 835–36.

²¹⁶ See p 40 above.

affected the subsequent development of the law in Thailand will be discussed in the next chapters.

CONCLUSION

Watson's approach has merit because it offers sensible explanations for legal change. His view that legal borrowing is the main source of legal change is convincing, but his excessive emphasis on lawmakers' and lawyers' role and his underestimation of external factors, especially with regard to success of receptions, need to be reassessed. This thesis considers both the advantages of his theory and criticism of it to delineate a method for the study of the reception of foreign private law in Thailand in 1925. It proposes to approach the matter via three main questions, what causes legal borrowing, how law is borrowed and whether legal borrowing is successful. These questions will be investigated mainly with the methodologies of comparative law and legal history. The next chapter will deal with the first question what caused legal change in Thailand?

CHAPTER 2

THE MODERNISATION OF THAI LAW: BACKGROUND

INTRODUCTION

Alan Watson observed that:

For law to be changed there must be a sufficiently strong impulse directed through a Pressure Force operating on a Source of Law. This impulse must overcome the Inertia, the general absence of a sustained interest on the part of society and its ruling élite to struggle for the most 'satisfactory' rule.¹

This statement seems to explain adequately how legal change in Thailand was triggered in the nineteenth century when commercial and military expansionism forced the Thai government to sign a treaty with Great Britain known as the Bowring Treaty of 1855. This treaty marked the beginning of the system of extraterritoriality in Thailand² and became the model for a series of treaties with other Western countries. Consular jurisdiction eventually proved to be disastrous to the Thai government as it came to be seriously abused by some Western powers. As a result, the Thai king and his government felt a strong impulse to modernise their traditional law in order to regain full judicial autonomy.³ The external challenge alone, however, is not sufficient to account for these changes. Contact with Westerners also helped the ruling elite to identify defects and the inadequacy of the Thai legal system which was founded on Indian moral ideologies. External pressure and internal motivation effected a major change in Thai society in general and the modernisation of Thai law in particular. The reforms of the legal system began with the reorganisation and westernisation of the judicial system and later the first law

¹ Alan Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 331.

² Francis Bowes Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22 AJIL 70, 70.

³ Preedee Kasemsup, 'Reception of Law in Thailand – A Buddhist Society' in Masaji Chiba, *Asian Indigenous Law: In Interaction with Received Law* (KPI 1986) 291; David M Engel, *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice* (UA Press 1978) 1.

school was established. Codification was the last stage of the modernisation of Thai law.

This chapter examines whether Watson's observation is really apposite to Thailand's experience of legal change. Although the main focus of this thesis is on how foreign private law was borrowed in the Thai legal system, the reception of foreign private law is not an isolated event in Thai history but part of social and political change: codification was part of the modernisation of the Thai legal system. To fully understand it, one must look at the reception of foreign private law in Thailand in context. This chapter therefore looks at the social and political background of traditional Thai society, the causes of legal change and the general process of modernisation to throw light on the question of why legal change in Thailand occurred in a particular manner.

1. AN OVERVIEW OF PRE-CODIFICATION THAI SOCIETY AND LAW

1.1 A brief history of Thailand

The origin of Thailand, known before 1939 as Siam,⁴ is a matter of controversy due to lack of reliable written records. Simon de la Loubère, Louis XIV's extraordinary envoy to Siam in 1687, noted that 'Siamese History is full of Fables'.⁵ It is commonly believed that the ancestors of the modern Siamese were *Tai* people who began to immigrate south from southern China from 100 BC. The *Tai* settled in present day Southeast Asia between the sixth and seventh centuries AD,⁶ where other ethnic groups were already present, notably the Mon and the Khmer (Angkor).⁷ Their settlements were in the Chao Phraya River basin⁸ and scattered over the region. These gradually developed into city-states, the primary political unit, known in Thai as *mueang*.⁹ The *Tai* notably had a distinct language, the foundation of the modern

⁴ In this thesis, 'Siam' and 'Thailand' are used interchangeably. So are 'Siamese' and 'Thai'.

⁵ Simon de la Loubère, *The Kingdom of Siam* (OUP 1969) 8.

⁶ WAR Wood, *A History of Siam: From the Earliest Times to the Year A.D. 1781* (Chalermnit Bookshop 1959) 31–32; HG Quaritch Wales, *Siamese State Ceremonies: Their History and Function* (Quaritch 1931) 13–14; Chris Baker and Pasuk Phongpaichit, *A History of Thailand* (2nd edn, CUP 2009) 3.

⁷ David K Wyatt, *Thailand: A Short History* (2nd edn, YUP 2004) 1; Wales, *ibid* 12; Baker and Phongpaichit, *ibid* 3.

⁸ Wyatt, *ibid* 2; Baker and Phongpaichit, *ibid* 4.

⁹ Baker and Phongpaichit, *ibid*. See also Wyatt, *ibid* 6.

Thai language, which identified them as a separate people.¹⁰ *Tai* culture, which was intensively connected to religious ideologies, proved to be the driving force behind the cultural development of Thailand over several centuries.¹¹ Archaeological and historical remains show that Theravada Buddhism was received in Southeast Asia mainly through the contacts with Buddhist missionaries from India as early as the beginning of the Buddhist Era,¹² which may be earlier than the reception of Brahmanism (ancient Hinduism).¹³ It is, however, the Mon people who firmly established a Theravada Buddhist civilisation in central Southeast Asia between the sixth and ninth centuries. This Buddhist culture was gradually absorbed into the life of the *Tai* people who lived on the fringes of the Mon kingdom.¹⁴

In the early ninth century the Angkorean kingdom replaced the Mon kingdom to become the single most powerful kingdom in central Southeast Asia.¹⁵ Although the Khmer practiced Mahayana Buddhism as early as the first century,¹⁶ from the seventh century Brahmanism became the personal religion of most of the Khmer kings.¹⁷ Their preferred religion spread over their land as evident by the remains of the Angkorean-Brahmanical temples across central and northeastern Thailand and Cambodia, but the well-established Theravada Buddhism from the time of the Mon kingdom largely immunised *Tai*'s culture and religious beliefs against Hinduism.¹⁸ The Brahmanical influence prevailed only in respect of governance and administration; Hindu concepts were borrowed to justify the supremacy of the monarch and the organisation of the government.¹⁹ A result of this borrowing was that Brahman priests (*purohit*), experts on Hindu law, had an important role to play in the administration of *Tai* states.²⁰

From the first half of the thirteenth century the Khmer Empire as well as the Burmese kingdom suffered a sharp decline paving the way for the rapid growth of some city-states of *Tai* people, especially in the Chao Phraya River valley and the upper peninsula, which, mainly by warfare, developed into more powerful political

¹⁰ Wyatt, *ibid.*

¹¹ *ibid* 20.

¹² The Buddhist era starts from the death of Gautama Buddha. In Thailand, this is equal to the Christian era plus five hundred and forty three years.

¹³ Wood, *History of Siam* 42–44; Wales, *Siamese State Ceremonies* 12–13.

¹⁴ Wyatt, *Thailand* 19–20.

¹⁵ *ibid* 21.

¹⁶ Wales, *Siamese State Ceremonies* 19.

¹⁷ Wood, *History of Siam* 46.

¹⁸ Wales, *Siamese State Ceremonies* 19; Wyatt, *Thailand* 24; Baker and Phongpaichit, *History of Thailand* 19.

¹⁹ HG Quaritch Wales, *Ancient Siamese Government and Administration* (Paragon Book 1965) 8.

²⁰ *ibid*; Wales, *Siamese State Ceremonies* 19.

units.²¹ These groups of *Tai* people were significantly socially and culturally different from the northern *Tai*. They employed Brahmanical beliefs and practices to establish a 'relatively more complex, hierarchical social and political organization'.²² Towards the end of the thirteenth century these people were, according to Chinese sources, known as Siamese.²³ Sukhothai, one of the early Siamese states, which emerged in the mid-thirteenth century, became the dominant power in the large part of present-day Thailand at least for half a century. Although it lasted almost two hundred years, from the early fourteenth century Kingdom of Sukhothai was in decline.²⁴

In about 1351, another Siamese state, the Kingdom of Ayutthaya, was established in the valley of Chao Phraya River region to the south of the Kingdom of Sukhothai.²⁵ Throughout its 400-year history, Ayutthaya was dominant among the *Tai* states and was one of the most powerful kingdoms in Southeast Asia.²⁶ By 1550, most of the neighbouring states, namely the Malay Kingdom, the Kingdom of Laos, Sukhothai, Chiang Mai, the Khmer Kingdom and the Shan States fell under the control of Ayutthaya.²⁷ It was during the era of Ayutthaya that contacts between the Siamese and European traders and missionaries were first recorded. The Portuguese, Spanish, Dutch and French were permitted to set up their own settlements outside the city walls. During the reign of Louis XIV, the relationship between France and Siam reached a peak; the two kingdoms exchanged diplomatic missions and the French won favour with the Siamese king.²⁸ Some western visitors to Ayutthaya, particularly during the sixteenth and seventeenth centuries, produced written records of their journeys and experiences. These were vital to later Siamese generations in search of their origins. The history of the Kingdom of Ayutthaya is revealed through a number of records of foreigners who visited Ayutthaya from the

²¹ Wyatt, *Thailand* 30; Baker and Phongpaichit, *History of Thailand* 7.

²² Wyatt, *ibid* 40.

²³ *ibid* 41.

²⁴ *ibid* 41–49.

²⁵ Richard D Cushman, *The Royal Chronicles of Ayutthaya: A Synoptic Translation* (Siam Society 2000) 10.

²⁶ Keith W Taylor, 'The Early Kingdoms' in Nicholas Tarling (ed), *The Cambridge History of Southeast Asia*, vol 1 (CUP 1992) 172; Wyatt, *Thailand* 57.

²⁷ Virginia Hooker, *A Short History of Malaysia: Linking East and West* (Allen & Unwin 2003) 72.

²⁸ David Wyatt 'Introduction' in Simon de la Loubère *The Kingdom of Siam* (OUP 1969) v-vi; Dirk van der Cruysse, 'Aspects of Siamese-French Relations during the Seventeenth Century' (1992) 80 JSS 63, 64; Prince Damrong, 'The Introduction of Western Culture in Siam' (1926-1927) 20 JSS 89, 91–92; G Coedès, 'Siamese Documents of the Seventeenth Century' (1921) 14 JSS 7, 7.

seventeenth century²⁹ visitors, notably Fernão Mendes Pinto (c 1650s),³⁰ Jeremias van Vliet (1633-1642),³¹ De la Loubère (1687-1688)³² and Nicolas Gervaise (1688).³³ These foreign accounts are more reliable than the highly controversial local fables and chronicles of the local tradition.

Although they were Buddhist rulers, the kings of Ayutthaya wisely extracted political benefits from the Hindu concepts of law and administration to strengthen their power.³⁴ Following the sack of Angkor Thom, the capital of the Khmer Kingdom by the Siamese in 1431, Khmer officials and priests were brought to Ayutthaya. These people were instrumental in effecting a change in Siam's social and political systems: the king gained semi-divine status³⁵ and the government was centralised. This allowed the ruler to exercise his direct authority over the feudal system which was previously administered by regional lords.³⁶ The Hindu-Khmer style of administration remained influential in Siam until the mid-nineteenth century.

The city of Ayutthaya was besieged and sacked by the Burmese in 1767 and this ended the four-hundred-year reign of the great Siamese kingdom. The Kingdom of Thonburi, as the successor of Ayutthaya, was established in the area on the west bank of the Chao Phraya River: this later merged into Bangkok. The new

²⁹ Ian Hodges, 'Time in Transition: King Narai and the Luang Prasoet Chronicle of Ayutthaya' (1999) 87 JSS 33.

³⁰ A Portuguese explorer and writer who travelled to several countries in Asia and wrote an account of his adventures. His memoir, *Pilgrimage* (*Peregrinação* in Portuguese), published in 1614, includes his experience in Siam in the mid-sixteenth century and is one of the earliest foreign accounts of Siamese society. See William Wood, 'Fernão Mendez Pinto's Account of Events in Siam' (1926-1927) 20 JSS 25. See also Joaquim de Campos, 'Early Portuguese Accounts of Thailand' (1940) 32 JSS 1.

³¹ The director of the Dutch East India Company in Ayutthaya between 1633 and 1642. He wrote three books about seventeenth century Siam, namely *Description of the Kingdom of Siam*, *The Short History of the Kingdom of Siam* and *The Historical Account of the War of Succession Following the Death of King Pra Interajatsia, 22nd King of Ayuthian Dynasty*. See Jeremie van Vliet, 'Jeremie van Vliet's Historical Account of Siam' (1938) 30 JSS 95. See also Alfons van der Kraan, 'The Dutch in Siam: Jeremias van Vliet and the 1636 Incident at Ayutthaya' [2000] 2 UNEAC Asia Papers

< http://www.une.edu.au/asiacentre/PDF/Kraan_1.pdf > accessed 5 December 2012.

³² David Wyatt, an eminent expert on Thai history, regards De la Loubère's book, *The Kingdom of Siam*, as the finest work on seventeenth century Siam, see Wyatt, 'Introduction' viii. See also Ronald Love, 'Simon de la Loubère: French Views of Siam in the 1680s' (1994) 82 JSS 155; George Sioris, 'Some 16th and 17th Century Interpretations of Japan and Siam Fróis-Álvarez-La Loubère-Gervaise: A Layman's Comparative Reading' (1994) 82 JSS 179, 182-83.

³³ A French missionary who produced a well-known historical account of Siam in 1688 called *The Natural and Political History of the Kingdom of Siam*. See Nicolas Gervaise, *The Natural and Political History of the Kingdom of Siam* (John Villiers tr, White Lotus 1989). See also Sioris, 'Some 16th and 17th Century Interpretations' 183-84.

³⁴ Baker and Phongpaichit, *History of Thailand* 14.

³⁵ Gervaise, *Natural and Political History* 125.

³⁶ Wales, *Ancient Siamese Government* 70.

kingdom lasted only fifteen years. In 1782, the king was executed and one of his generals succeeded him as the new Siamese king, known as King Rama I. The new monarch built a new capital in the original area of Bangkok, which is on the other bank of the Chao Phraya River and opposite Thonburi, as well as establishing a new dynasty called the House of Chakri. He named his new kingdom 'Rattanakosin'.³⁷ Ayutthayan traditions and political systems were considerably maintained in these two successive Siamese kingdoms. The early kings of the House of Chakri spent a great deal of time restoring old laws and practices of Ayutthaya.³⁸ The old social and political traditions were followed and underwent little change until the modernisation of the kingdom in the mid-nineteenth century.

1.2 Some social and political characteristics of pre-codification Thailand

Traditional Thai society was considerably shaped by Theravada Buddhism³⁹ but also integrated with other religious beliefs and traditions. Chris Baker and Pasuk Phongpaichit observe that

[i]n practice, this pure form of Theravada was blended with other religious practices, including roles for Hindu gods, notions of supernatural power often borrowed from tantric types of Buddhism, and folk beliefs in spirits – especially in their power to foretell and influence the future.⁴⁰

Buddhism involves everyday life from birth to death and forms the basis of Thai culture and identity. A formal educational system did not exist in traditional Thai society. Until the nineteenth century when modern schools were established,⁴¹ Thai men were educated by Buddhist monks at Buddhist temples.⁴² Although Hinduism seemed to be favoured by the rulers as a main source of their divine power and justification for absolutism, apolitical Buddhism never lost its influence over the

³⁷ Wyatt, *Thailand* 128–29.

³⁸ *ibid* 129–30; Wales, *Siamese State Ceremonies* 15.

³⁹ Gervaise, *Natural and Political History* 125–29.

⁴⁰ Baker and Phongpaichit, *History of Thailand* 19.

⁴¹ La-ortong Amarinratana, 'การส่งนักเรียนไปศึกษาต่อต่างประเทศตั้งแต่ พ.ศ. 2411-2475 (The Sending of Students Abroad from 1868-1932)' (MA Thesis, Chulalongkorn University 1979) 21–26.

⁴² De la Loubère, *Kingdom of Siam* 58; David K Wyatt, *Studies in Thai History: Collected Articles* (Silkworm Books 1994) 223; Jane Bunnag, 'Loose Structure: Fact or Fancy? Thai Society Re-examined' (1971) 59 JSS 1, 4; James Low, 'On the Laws of Muong Thai or Siam' (1847) 2 JIAEA 329, 381.

ruling class who used its philosophy to mitigate the rigidity of the Hindu system of administration.⁴³ The Thai social order was shaped by the Buddhist ideology that:

[a]s good Buddhists, the Thai perceive that all living beings stand in a hierarchy of varying ability to make actions effective and of varying degree of freedom from suffering... This hierarchy depends on a composite quality called 'merit' (*bun*) or 'virtue' (*khaamdii*), or one may also speak of a graded series of penalties (*baap*).⁴⁴

Unlike the term 'merit' in English which gives an impression of a fixed characteristic, Thai merit is changeable depending on a person's actions.⁴⁵ This is the reason why 'the Thai social order roots individuals in no permanent rank'⁴⁶ and why the Hindu caste system was never adopted.⁴⁷

There was great social mobility in Siam. There were two roles, superior and subordinate, in every type of relationship. The superior was expected to be 'benevolent calmly self-assured, authoritative (rather than authoritarian) while the subordinate is respectful, attentive, helpful but not necessarily obedient (although face to face disobedience would be unthinkable)'.⁴⁸

Each individual has, in fact, very similar kinds of relationships with his patron, his teacher, a senior kinsmen and a Buddhist monk, all of whom occupy a position of superiority with respect to him. Each of these relationships is of a very generalized patron/client type, and each tends to have a material component, which is to say that the inferior party receives not only advice and sponsorship, but also more tangible benefits in the form of financial support, either regular or only occasional.⁴⁹

Paternalism gave Thai society its political character from the foundation of Sukhothai in the thirteenth century.⁵⁰ From the time of their early states, Thai people fought with Southeast Asian states which already existed in the region. They needed the protection provided by their rulers and this may explain why

⁴³ Michael Wright, 'Ayudhya and Its Place in Pre-Modern Southeast Asia' (1992) 80 JSS 81, 83; Baker and Phongpaichit, *History of Thailand* 19–20.

⁴⁴ LM Hanks, 'Merit and Power in the Thai Social Order' (1962) 64 *American Anthropologist* 1247, 1247.

⁴⁵ *ibid*, 1247.

⁴⁶ *ibid* 1248.

⁴⁷ Richard A O'Connor, 'Law as Indigenous Social Theory: A Siamese Thai Case' (1981) 8 *American Ethnologist* 223, 225.

⁴⁸ J Mosel, *Some Notes on Self, Role and Role Behaviour of Thai Administrators* (Asian Studies 502 Thailand Seminar Cornell University 1965) 5 cited in Bunnag, 'Loose Structure' 7.

⁴⁹ Bunnag, *ibid*. See Akin Rabibhadana, *The Organization of Thai Society in the Early Bangkok Period 1782-1873* (Amarin Printing 1996) 157.

⁵⁰ Sarasin Viraphol, 'Law in Traditional Siam and China: a Comparative Study' (1977) 65 JSS 81, 83; Rabibhadana, *Organization of Thai Society* 25.

paternalistic monarchy never lost its prominence in Sukhothai where its relatively small size of territory and population meant the relationship between the rulers and their people was close and in Ayutthaya where paternalism was strengthened by the Hindu-Angorean system of administration which was imposed over its expansive kingdom.⁵¹ Because of constant military threats from neighbour states, Ayutthayan kings set up their kingdom 'as a proto-military state whereby the people were organized in specific groups, controlled, at the informal level, by a paternal scheme, and, on a more formal level, by the centralized Indian hierarchy'.⁵² The social and political structure of traditional Thai society had a pyramid shape 'with the monarch on the top and the hierarchic order of *Sakdina* under him'.⁵³ *Sakdina* (literally, 'dignity mark')⁵⁴ is the system of remuneration where land and titles were dispensed proportionally to those who served the ruler and the country. *Sakdina* varied from person to person, but the monarch always set a maximum level of privilege for each position.⁵⁵ The *Sakdina* system reflected the loose, informal social and political classes of traditional Thai society. Below the king, there were members of the royal family and government officials in various *Sakdina* ranks. The commoners, known in Thai as *Prai*, who always belonged to a band of a prince or an official, also had certain amount of privilege.⁵⁶ Slaves (*tars*) who attained no *Sakdina* were the lowest class of people.⁵⁷ The people of each *Sakdina* rank enjoyed their privilege proportionally and could be advanced in the hierarchy as long as the monarch was satisfied with their service.⁵⁸ *Sakdina* rank determined civil and criminal liability; fines and punishments were proportional to status.⁵⁹

The social and political structure which remained intact until the modernisation of the country in the nineteenth century formed an important character trait of Thai society. Sarasin Viraphol observes that

⁵¹ Viraphol, *ibid* 83-84. See also Walter F Vella, *The Impact of the West on Government in Thailand* (UC Press 1955) 322.

⁵² Viraphol, *ibid* 88. See De la Loubère, *Kingdom of Siam* 78; Wales, *Ancient Siamese Government* 25.

⁵³ Viraphol, *ibid*.

⁵⁴ Wales, *Ancient Siamese Government* 35.

⁵⁵ *ibid*; Rabibhadana, *Organization of Thai Society* 28-29.

⁵⁶ De la Loubère, *Kingdom of Siam* 78-79; Wales, *ibid*.

⁵⁷ Viraphol, 'Law in Traditional Siam and China' 88.

⁵⁸ *ibid* 85-86; Wyatt, *Thailand* 62.

⁵⁹ O'Connor, 'Law as Indigenous Social Theory' 228; Wyatt, *ibid*.

Political rather than moral-ethical considerations formed the primary basis of social organization in Siam. Due to constant threats of warfare in the Ayudhaya period as well as in the early part of the Chakkri, the main focus was on the individual's relationship to the state and, hence, it may be said that the state played a more direct role in personal life in Siam as compared to China where the primary relationship was rather in the familial sphere.⁶⁰

In other words, Thai people were accustomed to top-down rule and receiving orders from the ruler. This paternalism together with the superior-subordinate-relationship type exhibits important characteristics of traditional Thai society and formed part of modern Thailand's identity. These social and political features help us understand why Thai law has developed in a certain way. Similarly, acknowledging the role of Buddhism in shaping Thai society may help solve some puzzles, ie why some law has never been successfully adopted in Thai society. In Cotterrell's terms,⁶¹ traditional Thai society can in a general sense be considered as a 'community of belief', where the people were bound by a common religious faith. A borrowing of any law whose aims are contrary to Buddhist beliefs risks failure.⁶²

1.3 An overview of the pre-codification Thai legal system

This research focuses on two main aspects of the traditional Thai legal system: sources of pre-codification Thai law and the administration of justice: that is the court system and the nature of legal proceedings in traditional Thai society. Since the central theme of this research is the reception of foreign private law, it is also worth having an overview of traditional Thai private law which may provide a clue as to whether foreign law can be incorporated into Thai society successfully.

⁶⁰ Viraphol, 'Law in Traditional Siam and China' 88.

⁶¹ Roger Cotterrell, 'A Legal Concept of Community' (1997) 12 CJLS 75, 80.

⁶² Although the issue of legalising casinos and gambling was brought to public attention by some Thai governments, most people were against the idea. Similarly, the biggest Thai brewery company's attempts to join the stock market were opposed by religious groups. Since good Buddhists are committed to abstain from gambling and alcohol, legalising gambling and promoting alcoholic drinks businesses always fails in Thailand. For news on the casinos issue see 'Thailand Is Not Ready to Legalise Its Gambling Habit' *The Nation* (29 September 2011) <<http://www.nationmultimedia.com/opinion/Thailand-is-not-ready-to-legalise-its-gambling-hab-30166368.html>> accessed 7 December 2012. News on the brewery company see Anuchit Nguyen and Saikat Chatterjee, 'Thai Beverage Won't List in Thailand as Monks Protest' *Bloomberg* (21 November 2008) <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amAqo9MUEmxc&refer=consumer>> accessed 7 December 2012.

1.3.1 Sources of pre-codification Thai law

The best written evidence for constructing a clear picture of pre-codification Thai law is *Kojmai Tra Sam Duang* (กฎหมายตราสามดวง) or the Three-Seal Code,⁶³ the first comprehensive law of Thailand and the compilation of traditional Thai law existing before 1805.⁶⁴ This law was in use until the modern codes of Thailand were established a hundred years later. Pre-codification Thai law can be divided into written law and unwritten law. Traditional Thai law was mainly written law and can relatively easily be documented by written evidence. A study of unwritten law would be a work of anthropology and is not discussed here.

De la Loubère recorded that written law and written records of court proceedings were the normal practice of the Siamese since the time of the Ayutthaya Kingdom.⁶⁵ It has generally been accepted that, like several other Southeast Asian states,⁶⁶ traditional Thai law was considerably shaped by Indian moral ideologies.⁶⁷ There were two main sources of written law.⁶⁸ A stone inscription believed to have been erected during the Sukhothai Kingdom (1238-1438) refers to *Thammasat* and *ratchasatra* as the law of the land.⁶⁹ The role of *Thammasat* can be compared to that of a modern-day constitution. Its scope transcends the boundary of public law⁷⁰ and it

⁶³ Andrew Huxley, 'How Buddhist is Theravada Buddhist Law?: A Survey of Legal Literature in Pali-land' (1990) 1 Buddhist Forum 41, 67. See also Andrew Huxley, 'Introduction' in Andrew Huxley (ed), *Thai Law, Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 1, 7.

⁶⁴ Sompong Sucharitkul, 'Thai Law and Buddhist Law' (1998) 46 AJCL Supp 69, 75; Viraphol, 'Law in Traditional Siam and China' 1.

⁶⁵ De la Loubère, *Kingdom of Siam* 81, 86.

⁶⁶ MB Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press 1978) 17; O'Connor, 'Law as Indigenous Social Theory' 225.

⁶⁷ Sawaeng Boonchalermvipas, *ประวัติศาสตร์กฎหมายไทย* (Thai Legal History) (Winyouchon 2005) 86–87; Viraphol, 'Law in Traditional Siam and China' 93; O'Conner, *ibid*; T Masao, 'Researches into Indigenous Law of Siam as a Study of Comparative Jurisprudence' (1905) 2 JSS 14, 15; AB Griswold and Prasert na Nagara, 'A Law Promulgated by the King of Ayudhya in 1397 A.D.: Epigraphic and Historical Studies, No. 4' (1969) 57 JSS 109, 109.

⁶⁸ According to Andrew Huxley, a third written source is '*pyatton*', which was found in some parts of Thailand. Huxley describes it as 'a collection of precedents'. *Pyatton* can also mean 'a collection of folk stories describing the exploits of a clever judge'. Andrew Huxley, 'Studying Theravada Legal Literature' (1997) 20 JIABS 63, 72 and 79.

⁶⁹ Sukhothai Inscription No 38 cited in R Lingat, *ประวัติศาสตร์กฎหมายไทย* (Thai Legal History) (Thammasat UP 2010) 48; Boonchalermvipas, *ibid* 71; Griswold and na Nagara, 'Law Promulgated by the King of Ayudhya' 110; Huxley, 'Studying Theravada Legal Literature' 69. See the texts of the inscription in Griswold and na Nagara, *ibid* 120–45. Andrew Huxley argues that this reference does not necessarily mean that *Thammasat* and *ratchasatra* existed during the Sukhothai period and speculates that the words may be borrowed from Burma or Cambodia. See Andrew Huxley, 'Thai, Mon & Burmese Dhammathats - Who Influenced Whom?' in Andrew Huxley (ed), *Thai Law, Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 119.

⁷⁰ Lingat, *Thai Legal History* 50; Hooker, *Concise Legal History* 32.

extends even to the matters which now fall within the area of private law.⁷¹

Thammasat had universally been used by Siamese kings for the administration of justice in Siam. It was regarded as the supreme expression of truth and equity, demonstrating how justice should be rightly administered.⁷²

Thammasat (*Dhammasattha* in Pali)⁷³ originated from the Hindu Laws of Manu. Nevertheless, the Siamese did not adopt it directly from the original but from the Mon Buddhist version (*dhammasattham*) to suit their social and religious conditions.⁷⁴ Some original Hindu principles, for example the Manu legend,⁷⁵ which helped to justify royal power⁷⁶ and several provisions concerning debt, property, marriage and remarriage were adjusted⁷⁷ while some Hindu institutions, especially the caste system, were rejected.⁷⁸ As the spirit of *Thammasat* was grounded in Theravada Buddhism, the Brahmanical concept of the Law of Manu which makes spiritual and secular matters inseparable was also rejected⁷⁹ since the 'law of a new Manu, greatly different from Brahmanical laws of Manu, by its being merely a civil or lay law, i.e. law, still of a transcending nature, but concerning social organisation only'.⁸⁰ By virtue of Buddhism, '*Thammasat* describes its ideal of a monarch as a King of Righteousness, elected by the people (the *Mahasammata*)'.⁸¹ According to *Thammasat*, an ideal monarch

⁷¹ Lingat, *ibid.*

⁷² R Lingat, 'Evolution of the Conception of Law in Burma and Siam' (1950) 38 JSS 10, 24–25; Lingat, *ibid* 56; Viraphol, 'Law in Traditional Siam and China' 100.

⁷³ 'As the Latin language was to Europe, so Pali was to Buddhist S.E. Asia'. Huxley, 'Introduction' 13.

⁷⁴ Prince Dhani, 'The Old Siamese Conception of the Monarchy' (1947) 36 JSS 91, 94; Lingat, 'Evolution' 12; Lingat, *Thai Legal History* 46; Viraphol, *ibid* 94; MB Hooker, 'The Indian-Derived Law Texts of Southeast Asia' (1978) 37 J Asian Stud 201, 208; O'Connor, 'Law as Indigenous Social Theory' 225; Griswold and Na Nagara, 'Law Promulgated by the King of Ayudhya' 109. However, through his studies of Burmese literature, Huxley challenged the notion that the Mon were legal pioneers and offered a new explanation that the law of Thai city-states was influenced by the Burmese version of the law of Munu (*dhammathat*) as early as the late fourteenth century. See Huxley, 'Thai, Mon & Burmese Dhammathats' 81–131.

⁷⁵ Manu is, according to the *Manusmṛti* (Laws of Manu), the progenitor of mankind and the only one who knows 'the effects, the true nature, and the object of [the] universe' and who creates the world. Robert Lingat, *The Classical Law of India* (J Duncan M Derrett tr, UC Press 1973) 78–79.

⁷⁶ Lingat, 'Evolution' 17.

⁷⁷ Hooker, 'Indian-Derived Law Texts' 205.

⁷⁸ O'Connor, 'Law as Indigenous Social Theory' 225.

⁷⁹ Lingat, 'Evolution' 16; Viraphol, 'Law in Traditional Siam and China' 94–95. See also Yoshino Ishii, 'The Thai *Thammasat*' in MB Hooker (ed), *Laws of South-East Asia*, vol 1 (Butterworth 1986) 195.

⁸⁰ Lingat, *ibid.* See also O'Connor, 'Law as Indigenous Social Theory' 225; Hooker, 'Indian-Derived Law Texts' 205.

⁸¹ Prince Dhani, 'Old Siamese Conception of the Monarchy' 94.

abides steadfast in the ten kingly virtues, constantly upholding the five common precepts and on holy days the set of eight precepts, living in kindness and goodwill to all beings. He takes pains to study the *Thammasat* and to keep the four principles of justice, namely: to assess the right or wrong of all service or disservice rendered to him, to uphold the righteous and truthful, to acquire riches through none but just means and to maintain the prosperity of his state through none but just means.⁸²

Ratchasatra or royal ordinances, a supplement to *Thammasat*, put the principles of the latter into practice.⁸³ Kings enjoyed absolute power and could act as they pleased, but their decisions were merely orders. These could not contradict *Thammasat* and remained effective as long as the ruler who issued them lived, unless they were sanctioned by the new ruler.⁸⁴ The system of *ratchasatra* formed a system of positive law (or 'legislation' in Huxley's terms)⁸⁵ that was not completely separate from the eternal law of *Thammasat*. In the early period of Siam, its kings collected the decisions and ordinances of their predecessors and put them in books separate from *Thammasat* in order to make use of them. The value and authority of such records were due to the king's reputation of being a good ruler, for example a ruler who governed in accordance with the rules of *Thammasat*. Later rulers checked whether the old royal decisions and ordinances accorded with *Thammasat* and if they did they were then written in the form of sections and placed under the corresponding heading of *Thammasat*. This made them permanent rules, not because of them being the king's legislation but because they reflected the eternal law.⁸⁶

Following the sack of the Ayutthaya Kingdom in 1767 which mostly destroyed Siamese legal literature kept in the capital, King Rama I embarked on a project to restore the old law of Ayutthaya. This resulted in the compilation of the Three-Seal Code, the integration of *Thammasat* and *ratchasatra* in 1805.⁸⁷ The Three-Seal Code was not a mere reproduction of the old laws.⁸⁸ The king corrected the old sources by checking whether they were in accord with Buddhist morals.⁸⁹ The Code covers a wide-range of areas of law which fall into roughly five categories: public

⁸² *ibid.*

⁸³ Lingat, 'Evolution' 18; Huxley, 'Studying Theravada Legal Literature' 75.

⁸⁴ DK Wyatt, *The Politics of Reform in Thailand: Education in the Reign of King Chulalongkorn* (YUP 1969) 8.

⁸⁵ Huxley, 'Studying Theravada Legal Literature' 72.

⁸⁶ Lingat, 'Evolution' 27.

⁸⁷ Rama I, *กฎหมายตราสามดวง ฉบับราชบัณฑิตยสถาน* (The Three-Seal Code: The Royal Institute Edition), vol 1 (Royal Institute 2007) 70–73; Klaus Wenk, *The Restoration of Thailand under Rama I* (UA Press 1978) 35; Direck Jayanama, *The Evolution of Thai Laws* (Royal Thai Embassy 1964) 11.

⁸⁸ Ishii, 'Thai Thammasat' 145.

⁸⁹ See the Preamble of the Three-Seal Code in Rama I, *Three-Seal Code*, vol 1, 70–71. See also David M Engel, *Law and Kingship in Thailand during the Reign of King Chulalongkorn* (University of Michigan 1975) 4–5; Hooker, 'Indian-Derived Law Texts' 206.

law and administrative law, the administration of courts and procedural law, criminal law and law on delict, private law and Buddhist law. Until the establishment of modern laws and codes from the late nineteenth century, the Three-Seal Code was the supreme and universal law of the Siamese people.

1.3.2 Traditional Thai private law

The Three-Seal Code shows that there were a number of forms of contracts which can be compared to modern-day contracts, for example loan, purchase, hire, bailment, lease, gift and pledge and guarantee existing in Thailand prior to the reception of foreign private law in the nineteenth century.⁹⁰ They are not arranged systematically.⁹¹ While loan was contained in a book of the Three-Seal Code entitled *Pra Ayakarn Gu Nee* (พระไอยการกู้หนี้) or the law on loans,⁹² the other mentioned types of contracts were contained in *Pra Ayakarn Bed Set* (พระไอยการเบดเส็จ) or the law on various infractions.⁹³ Robert Lingat observes that traditional Thai contracts had two important features. First, all types of contracts described in the Three-Seal Code concern a transfer of a property. Second, a contract was not enforceable until the property was delivered to the other party.⁹⁴ The law did not distinguish between contractual, delictual or criminal liability.⁹⁵ The law on purchase, for instance, stipulates that if a purchaser fails to make a payment to the vendor pursuant to the transfer of a property he will face both civil and criminal liabilities. The text of the relevant provision states that

Pursuant to the purchase agreement on which the purchase price has been agreed, the purchaser has received the property but has not paid the vendor for it despite notice given. The vendor shall ask the court to summon him to appear before it. If the vendor's claim is true, the purchaser will be liable for his dishonesty which amounts to twice the price of the property. Half of it will be returned to the vendor for the price of the

⁹⁰ See Ishii, 'Thai Thammasat' 188-94.

⁹¹ See Seni Pramroj, 'กฎหมายสมัยอยุธยา (ตอนที่ 2) (Ayuthayan Law (Installment II))' in *Electronic Library of the Thai Court of Justice* 45 < http://elib.coj.go.th/Article/d14_6_5.pdf > accessed 15 April 2013.

⁹² Rama I, *Three-Seal Code*, vol 1, 50.

⁹³ Rama I, *กฎหมายตราสามดวง ฉบับราชบัณฑิตยสถาน* (The Three-Seal Code: The Royal Institute Edition), vol 2 (Royal Institute 2007) 423.

⁹⁴ Lingat, *Thai Legal History* 204-05.

⁹⁵ *ibid* 206; Gervaise, *Natural and Political History* 77; Jayanama, *Evolution* 16; Engel, *Law and Kingship* 61-62.

property. He will also receive half of the remaining sum as compensation while the other half will be treated as a fine.⁹⁶ [My translation]

Michael Hooker explains that individual responsibility which was constituted by a contract was as much a moral, ethical, or religious matter as it was a legal one.⁹⁷ In other words, the possession of the other party's property caused a moral obligation for the possessor to do something in return.⁹⁸ Comparing traditional Thai contracts with modern Thai contracts contained in the Civil and Commercial Code of 1925 ('Code of 1925'), which were products of European legal science, one can claim that Henry Maine's famous generalisation that the movement of progressive law and societies is the movement from status to contract⁹⁹ appropriately explains the development of Thai law and society in the nineteenth century. In Hooker's terms, pre-codification Thai law was overwhelmingly concerned with 'the distribution of obligation between persons of different status' and this 'obligation was a function of status and was ascribed on the basis of status rather than on the basis of personal initiative'.¹⁰⁰ This is consistent with Huxley's general observation on Theravada legal literature that 'no sharp distinction was made between law, morality and good behaviour'.¹⁰¹ The fact that traditional Thai economy was agriculture-based may also explain why traditional Thai private law, especially commercial law, was not as developed as some European private law of the same period. James Low observed in the first half of the nineteenth century that

The Siamese are rather an agricultural than a trading people...The great body of the people, spread over the country, live chiefly by cultivating the soil; – and the population of their towns, by petty trades and traffick, chiefly in agricultural produce. For although Bangkok, the capital, exhibits a busy commercial scene, yet it is to the Chinese that the impulse must be attributed.¹⁰²

In such economic conditions, it is understandable that traditional Thai private law was concerned more with transfers of property and less on commercial activities and that it was more interested in the protection of farmers' property than the facilitation of trade. Despite the fact Ayutthaya's income was significantly generated

⁹⁶ Three-Seal Code, s 97 in Rama I, *Three-Seal Code* 446.

⁹⁷ Hooker, *Concise Legal History* 10.

⁹⁸ Lingat, *Thai Legal History* 287; Ishii, 'Thai Thammasat' 188.

⁹⁹ Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (8th edn, J Murray 1880) 170.

¹⁰⁰ Hooker, *Concise Legal History* 10. See also Lingat, *Thai Legal History* 200.

¹⁰¹ Huxley, 'Studying Theravada Legal Literature' 81.

¹⁰² Low, 'On the Laws of Muung Thai' 335.

by maritime trade especially with the Chinese since the thirteenth century,¹⁰³ there was no evidence of the law which governed commercial activities. Huxley gave two plausible explanations for the absence of written commercial law in traditional Thai society. First, the Siamese political regime where the monarch had absolute power which enabled him to monopolise trade and take whatever he wishes encouraged the traders to use political rather than legal tools to solve the disputes. Second, *Thammasat* may provide governing rules on trade and banking. But '[i]f such rules existed at all, they would be in the oral custom observed between local traders, mixing local rules with borrowing from China, Arabia and Rome'.¹⁰⁴

1.3.3 The administration of justice before the reform of justice in the nineteenth century

According to De la Loubère, the judiciary style and form of pleading of late seventeenth century Ayutthaya reflected the social and political conditions of Siamese society.¹⁰⁵ The Siamese people were traditionally organised in specific groups for military purposes and each group had its own chief or master. In cities other than the capital, a complaint had first to go to the plaintiff's master, who simultaneously served as a member of the consultative panel (or assessors) at the court. The complaint was then presented to the governor of the city, who acted as the sole justice.¹⁰⁶ The governor decided whether the complaint should be admitted. If so, he would assign one of his assessors to direct the trial. Where both parties had a common master, the governor often assigned their master to preside at the court.¹⁰⁷ The case was processed and the witnesses were heard in the governor's absence but before a panel of assessors led by the assignee. At the end of the trial, they gave their opinion which was written down by a clerk. The judgement, however, was actually made by the governor, who appeared in the court on the very last day of the process, after listening to the opinions of the assessors and the opinion of another officer who pointed out what law was relevant to the fact.¹⁰⁸ As observed by Gervaise in the late seventeenth century, the governor's decision was

¹⁰³ Baker and Phongpaichit, *History of Thailand* 10.

¹⁰⁴ Huxley, 'Introduction' 25.

¹⁰⁵ De la Loubère, *Kingdom of Siam* 85.

¹⁰⁶ *ibid* 82. However, Gervaise's account of the role of the governor as the chief justice implied that there was more than one judge sitting at the court. See Gervaise, *Natural and Political History* 75.

¹⁰⁷ De la Loubère, *Kingdom of Siam* 86.

¹⁰⁸ *ibid*.

usually the same as that of the majority of his assessors.¹⁰⁹ De la Loubère noted that when the normal evidence did not suffice, the court resorted to torture, proof by water, proof by fire and other modes of ordeal and superstitious proof with the exception of trials by combat which did not exist in the Siamese system.¹¹⁰ These extraordinary proofs took place publicly. When he decided that the defendant deserved capital punishment, the governor had to refer the case to the king. Only the monarch had the authority to take a life unless he granted the justice royal permission for issuing death penalty.¹¹¹

In the capital, Ayutthaya, the king acted as the governor and supreme judge. Trials often took place at the royal chamber before a prince who represented the king.¹¹² The prince consulted his assessors before he delivered the judgement in the same way as a provincial governor.¹¹³ There was no distinction between civil and criminal disputes in the modern sense. A delict case could result in a criminal punishment¹¹⁴ likely because even civil cases could undermine public order.¹¹⁵

After the fall of Ayutthaya, substantive and procedural laws were put in one place. The 1805 Three-Seal Code dedicated seven books to dealing specifically with legal proceedings and the administration of justice. Book Four, *Pra Thammanoon* (พระทำนูน), particularly focused on the court's jurisdiction in the capital. Its provisions show that there were several courts belonging to different government departments.¹¹⁶ This was not mentioned by De la Lubère and Gervaise in their memoirs, but Lingat explains that the multi-court system emerged from the late Ayutthaya era most likely because the royal court, which was the single court in the capital, was unable to cope with the increasing number of disputes.¹¹⁷ However, the trial processes of Ayutthaya and Bangkok were not significantly different. One of their common features was that there were various judicial officers involved in trials from the admission of complaints to the making of judgements. Assessors interrogated the parties and witnesses. Judges decided the facts and pronounced sentences. Interpreters recommended relevant legal provisions and punishments for judges.¹¹⁸ As witnessed by John Bowring (1792–1872), then Governor of Hong Kong,

¹⁰⁹ *ibid* 84.

¹¹⁰ *ibid* 86.

¹¹¹ *ibid* 87; Gervaise, *Natural and Political History* 75.

¹¹² De la Loubère, *ibid* 88; Gervaise, *ibid* 77.

¹¹³ De la Loubère, *ibid*.

¹¹⁴ Lingat, *Thai Legal History* 468; *ibid* 85.

¹¹⁵ Lingat, *ibid* 464.

¹¹⁶ Rama I, *Three-Seal Code*, vol 1, 75. See also Ishii, 'Thai Thammasat' 166-67.

¹¹⁷ Lingat, *Thai Legal History* 469; Wales, *Ancient Siamese Government* 180.

¹¹⁸ Lingat, *ibid* 470-71; Jayanama, *Evolution* 14–15.

who was sent to Bangkok to amend the treaty with the Siamese government in 1855, this complexity of legal proceedings and the separation of the judicial duties in a trial continued to exist in accordance with the procedural law of the Three-Seal Code until the nineteenth-century reform of the justice system.¹¹⁹

2. CAUSES OF THE RECEPTION

If one compares the parts of the Three-Seal Code concerning private law with the contemporary French *Code civil* of 1804, one may find the Thai law rather antiquated and based heavily on religious principles. Foreign visitors to Thailand in the nineteenth century, however, made some interesting observations about the traditional legal system of the country. Bowring, visiting Bangkok in 1855, acknowledged that traditional Thai law suited the local people reasonably well and was superior to Chinese law.¹²⁰ Similarly, Jean-Baptiste Pallegoix (1805–62), a French Vicar Apostolic, stated that '[Siamese people] have proved very wise in general, in compliance with natural law and well adapted to the character and morals of the nation'.¹²¹ Ernest Young (1869-1952), an English educator, praised the Three-Seal Code for its quality: 'Siam possesses an excellent code of laws. They are, in the main, just and well suited to the people for whom they were intended'.¹²² Pre-codification Thai law is even praised by contemporary experts on legal history of Southeast Asia, notably Huxley, who considers traditional Thai law one of the world's great legal systems.¹²³ Although trial by ordeal and cruel punishment were in theory recognised in traditional Thai law, in practice they were not usually used¹²⁴ because of Buddhist virtues that encourage people to treat each other and living creatures humanely and benevolently.¹²⁵

¹¹⁹ John Bowring, *The Kingdom and People of Siam*, vol 1 (OUP 1969) 170–83. See also Prince Damrong, 'ลักษณะการปกครองประเทศสยามแต่โบราณ (Ancient Siamese Administration)' in Department of Fine Arts (ed), *อนุสรณ์ในงานพระราชทานเพลิงศพนายปณจิตต์ เอนกวนิช (In Memory of Mr Panchit Anekvanich)* (Department of Fine Arts 1972) 23.

¹²⁰ Bowring, *ibid* 173.

¹²¹ Jean-Baptiste Pallegoix, *Description of the Thai Kingdom or Siam: Thailand under King Mongkut* (Walter EJ Tips tr, White Lotus 2000) 189.

¹²² Ernest Young, *The Kingdom of the Yellow Robe* (3rd edn, Archibald Constable 1907) 223.

¹²³ Huxley, 'Introduction' 3.

¹²⁴ Karl Döhring, *The Country and People of Siam* (Walter EJ Tips tr, White Lotus 1999) 34; Charles Buls, *Siamese Sketches* (Walter EJ Tips tr, White Lotus 1994) 61.

¹²⁵ Kanaphon Chanhom, 'Codification in Thailand during the 19th and 20th Centuries: A Study of the Causes, Process and Consequences of Drafting the Penal Code of 1908' (PhD Thesis, University of Washington 2010) 64.

If the traditional legal system of Thailand was as good as Westerners thought, the interesting question arises as to why the Thai government was so desperate to have a modern code. The answer to this question lies with two factors: external pressure and internal motivation.

2.1 External pressure

The Opium War in China (1839–42) signified a change in the position of the British Empire towards certain Asian states.¹²⁶ In 1850, the government of Queen Victoria sent Sir James Brooks to negotiate a new commercial treaty with the aim of removing all restrictions on trade and in place of the first Anglo-Siamese Treaty, the 1826 Burney Treaty, but negotiations with King Rama III, a conservative,¹²⁷ who refused such idea of liberal trading,¹²⁸ failed.¹²⁹ The unsuccessful mission of Brooks caused great concern to the new king, Rama IV (King Mongkut), who was enthroned in the next year. The British Government sent another mission led by Bowring, then Governor of Hong Kong, with military force at his disposal for the same purpose in 1855. As Siam wished to avoid an armed conflict and Great Britain 'a repetition of the Second Anglo-Burmese War (1852)',¹³⁰ the negotiation was completed within a few weeks and a new treaty, commonly known as the Bowring Treaty, was concluded on 8 April 1855.¹³¹ For Siam, signing the 'unfair treaty' with the world's most powerful nation meant the preservation of independence.¹³² The Bowring Treaty not only gave the British commercial advantages but also provided them with rights of extraterritoriality. The extraterritorial clause states:

II. The interests of all British subjects coming to Siam shall be placed under the regulations and control of a consul, who will be appointed to reside at Bangkok...Any dispute arising between Siamese and British subjects shall be heard and determined by the consul, in conjunction with the proper Siamese officers; and criminal offenses will be punished, in the case of English offenders, by the consul, according to English laws, and in the case of Siamese offenders, by their own laws through the Siamese authorities. But the consul shall not interfere in any matters referring solely to Siamese,

¹²⁶ Wyatt, *Thailand* 163; Baker and Phongpaichit, *History of Thailand* 45.

¹²⁷ Wyatt, *ibid* 159.

¹²⁸ Baker and Phongpaichit, *History of Thailand* 45; *ibid* 163–64.

¹²⁹ John Bowring, *The Kingdom and People of Siam*, vol 2 (OUP 1969) 209–11; Wyatt, *ibid* 167.

¹³⁰ Wyatt, *ibid* 168.

¹³¹ Bowring, *Kingdom and People of Siam*, vol 2, 228.

¹³² Nicholas Tarling, 'The Establishment of the Colonial Régimes' in Nicholas Tarling (ed), *The Cambridge History of Southeast Asia*, vol 2 (CUP 1992) 46, 50.

neither will the Siamese authorities interfere in questions which concern only the subjects of Her Britannic Majesty.¹³³

To keep balance between foreign powers, the Siamese government signed similar treaties with other states, namely the United States of America (1856), France (1856), Denmark (1858), the Hanseatic Republic (1858), Portugal (1859), the Netherlands (1860), Prussia and the States of the German Customs and Commercial Union and the Grand Duchies of Mecklenburg - Schwerin and Mecklenburg-Strelitz (1862), Sweden and Norway (1868), Belgium (1868), Italy (1868), Austria-Hungary (1869), and Spain (1870).¹³⁴

Extraterritorial privileges did not at first pose a threat to the Siamese authority and hardly anyone anticipated that extraterritoriality would become a barrier to the future development of Siam.¹³⁵ The system of consular jurisdiction was even thought to be advantageous to the Siamese government since that it was relieved of the responsibility to provide the Western states with their accustomed system of law.¹³⁶ The situation changed after the Suez Canal was opened in 1869. This led to a dramatic increase in the number of Western travellers to Southeast Asia.¹³⁷ But it was the French annexation of Annam and Cambodia and Great Britain's victory over Upper Burma that significantly caused problems for the implementation of the extraterritorial clauses.¹³⁸ Citizens of these occupied countries began to claim that they also benefited from consular jurisdiction. Later, a claim to the extraterritorial privilege extended to subjects of other states who resided in Thailand and were registered for the protection from the Western powers (*protégé*).¹³⁹ The system of extraterritoriality was abused to the extent that some Siamese citizens would register as *protégés* and some even secretly sold their issued certificates to others.¹⁴⁰ By the end of the nineteenth century, the number of people who were exempt from the Thai courts' jurisdiction had increased dramatically.¹⁴¹ In addition to the problem of the expansion of consular jurisdiction, the diversity of foreign legal

¹³³ Foreign Office, *British and Foreign State Papers*, vol 46 (HMSO 1865) 138.

¹³⁴ Sayre, 'Passing of Extraterritoriality' 71–72.

¹³⁵ *ibid* 71.

¹³⁶ WAR Wood, *Consul in Paradise: Sixty-nine Years in Siam* (Trasvin Publications 1965) 24.

¹³⁷ Charles F Keyes, *The Golden Peninsula: Culture and Adaptation in Mainland South-East Asia* (Macmillan 1977) 96.

¹³⁸ Wood, *Consul in Paradise* 30–31.

¹³⁹ Wyatt, *Thailand* 190; Nathabanja, *Extra-territoriality in Siam* (Bangkok Daily Mail 1924) 121; Baker and Phongpaichit, *History of Thailand* 49; Chanhom, 'Codification in Thailand' 80.

¹⁴⁰ Sayre, 'Passing of Extraterritoriality' 76.

¹⁴¹ Chanhom, 'Codification in Thailand' 81–82.

systems operating in Siam created inequality in justice among people who lived in the same country.¹⁴²

The Siamese government worked tirelessly to end extraterritorial terms which 'contained no time limit' and 'could not be modified without the consent of both parties'.¹⁴³ In 1883, it achieved some progress when Great Britain allowed its subjects living in some northern Siamese provinces to be tried under Siamese law by a special Siamese court known as the Siamese International Court but reserved its right to reject the court any time before judgement, and transfer the case to its consular court.¹⁴⁴ Following the example of the Anglo-Siamese Treaty of 1883, the French amended its treaty with Siam in 1904. Francis Sayre, a Harvard law professor who served as a Foreign Affairs Adviser to King Rama VI (Vajiravudh), explained that

[t]his so-called Siamese International Court' was not in fact international at all. It was only a new name for the Siamese tribunal created under the Anglo-Siamese Treaty of 1883, a court created by and entirely within the control of the Siamese Government, presided over by a judge chosen and paid solely by the Siamese Government.¹⁴⁵

In 1898, Siam entered into a treaty with Japan, which was given similar extraterritorial privileges, but for the first time this treaty contained a clause specifying certain conditions for the end of extraterritoriality.¹⁴⁶ Recognising the Siamese progress in modernisation,¹⁴⁷ the Japanese agreed to abolish its consular jurisdiction upon the completion of the reforms of law and judicial administration in Siam, ie the promulgation of the Siamese codes of law. The Japanese treaty of 1898 states that:

The Siamese Government consent that Japanese consular officers shall exercise jurisdiction over Japanese subjects in Siam until the judicial reforms of Siam shall have been completed, that is, until a criminal code, a code of criminal procedure, a civil code (with exception of a law of marriage and succession), a code of civil procedure and a law of constitution of the courts of justice shall come into force.¹⁴⁸

¹⁴² *ibid* 83.

¹⁴³ Sayre, 'Passing of Extraterritoriality' 71.

¹⁴⁴ Foreign Office, *British and Foreign State Papers*, vol 74 (HMSO 1884) 78.

¹⁴⁵ Sayre, 'Passing of Extraterritoriality' 76–77.

¹⁴⁶ Eldon R James, 'Jurisdiction over Foreigners in Siam' (1922) 16 AJIL 585, 594.

¹⁴⁷ MB Hooker, 'The 'Europeanization' of Siam's Law 1855-1908' in MB Hooker (ed), *Laws of South-East Asia*, vol 2 (Butterworth 1988) 554–55.

¹⁴⁸ Foreign Office, *British and Foreign State Papers*, vol 90 (HMSO 1901) 66–70.

This clause set an example for subsequent amendments to some treaties.¹⁴⁹ In 1907, Siam and France signed a new treaty which allowed French Asiatic subjects and protégés registered before 1907 to be tried in the Siamese International Courts while those who registered after 1907 to be subject to the jurisdiction of the ordinary Siamese courts. This meant that French European citizens and subjects retained their extraterritorial privileges. Unlike the Japanese treaty of 1898, the new Franco-Siamese Treaty attached no condition for ending extraterritoriality but agreed to abolish the regime of the Siamese International Court once all the Siamese codes of law were established. The treaty also laid down a condition that to appeal a decision of the first-instance Siamese International Court, the signatures of two European judges sitting at the Court were required.¹⁵⁰ This indirectly results in ‘the requirement of European advisers sitting as judges in Siamese courts’.¹⁵¹ In 1909, Great Britain signed a new treaty following the example of the Franco-Siamese Treaty of 1907. However, it did not separate its subjects of European and Asiatic origin meaning that all British subjects registered before 1909 were subject to the Siamese International Courts and those after 1909 to the ordinary Siamese courts. The Anglo-Siamese Treaty of 1909 required that a European judge sit at the court of first instance of both the ordinary Siamese courts and the Siamese International Courts and where a European British subject was defendant the opinion of the European judge would prevail.¹⁵² Despite the European powers’ interference in the Siamese judiciary, Sayre observes that

the European adviser was in every sense a Siamese official; the Siamese Government freely chose him, paid him and controlled him...In practice the European advisers have been chiefly British and French, and they have generally acted quite independently of the desires and wishes of the British and French legations’.¹⁵³

Siam paid a heavy price for the relaxation of extraterritoriality which resulted from the French and British treaties in 1907 and 1909 respectively.¹⁵⁴ It lost some north-eastern provinces, namely Battambang, Siem Reap and Serei Sophorn, which are part of present-day Cambodia, to France in 1906 and some provinces of the

¹⁴⁹ Hooker, ‘Europeanization’ 555.

¹⁵⁰ Foreign Office, *British and Foreign State Papers*, vol 100 (HMSO 1909) 1028.

¹⁵¹ Sayre, ‘Passing of Extraterritoriality’ 79. See also James, ‘Jurisdiction over Foreigners’ 599.

¹⁵² Foreign Office, *British and Foreign State Papers*, vol 102 (HMSO 1911) 126.

¹⁵³ Sayre, ‘Passing of Extraterritoriality’ 80.

¹⁵⁴ Songsri Foran,

‘การแก้ไขสนธิสัญญาว่าด้วยสิทธิสภาพนอกอาณาเขตกับประเทศมหาอำนาจในรัชสมัยพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (The Amendment of Extraterritoriality Clauses between the Thai and Foreign Governments during the Reign of King Rama VI)’ (Chulalongkorn University 1959) 123.

Malay Peninsula, namely Perlis, Kedah, Kelantan and Terengganu, which are part of present-day Malaysia, to Great Britain in 1909.¹⁵⁵ It also had to agree to some conditions set by the Western powers in order to relax or amend the treaties, for example hiring their nationals to be judges and legislative advisers to the Siamese government.¹⁵⁶

In 1920, the US became the first country abolished entirely its consular jurisdiction which had been established by the American-Siamese Treaty of 1856. All Americans were therefore subject to the jurisdiction of the ordinary Siamese courts within an agreed time frame.¹⁵⁷ This treaty marked a turning point in Siam's struggle for full jurisdictional autonomy and raised its hopes of ending the unfair treaties. With the help of the US government, the Siamese government used the 1920 treaty to negotiate with other countries, several of which began to accept Siam's full judicial autonomy.¹⁵⁸ The British, however, hesitated to immediately give up their consular jurisdiction as British trade was predominant in Siam and British interests were far more substantial than those of any other countries.¹⁵⁹ It was not until 1925 that Great Britain and France agreed to free Siam from extraterritoriality within a set time frame. By the end of 1927, Siam had achieved new terms setting out to abolish the consular jurisdictions with all the party countries.

2.2 Internal motivation

Bowring foresaw that

The country will be absolutely revolutionised by the change, – and in a few years I doubt not there will be an enormous trade.¹⁶⁰

But the 1855 Bowring Treaty did not limit its effects to Thai commerce. It, in fact, had a wide-ranging impact on Siamese society in the sense that it forced the Siamese to explore their own weaknesses in every respect. However, the modernisation of the country, especially of Thai law, would not have been possible without its

¹⁵⁵ Tarling, 'Establishment of the Colonial Régimes' 46. See also Hooker, 'Europeanization' 558.

¹⁵⁶ For example, an agreement between the Thai and French government in 1923. See Foran, 'Amendment of Extraterritoriality Clauses' 150–70.

¹⁵⁷ Foreign Office, *British and Foreign State Papers*, vol 113 (HMSO 1922) 1168.

¹⁵⁸ Foran, 'Amendment of Extraterritoriality Clauses' 150–93. See also Sayre, 'Passing of Extraterritoriality' 81–88.

¹⁵⁹ Sayre, *ibid* 85.

¹⁶⁰ Letter from John Bowring to Edgar Bowring (13 April 1855) cited in Nicholas Tarling, 'Harry Parkes' Negotiations in Bangkok in 1856' (1965) 53 JSS 153, 153.

internal motivation. The extraterritorial clauses of the original 'unfair treaties' never imposed any conditions for ending extraterritoriality. It was the kings and their governments who showed enthusiasm for creating a modern Siam and a modern Thai legal system in order to recover full judicial autonomy and for the future prosperity of the country.¹⁶¹ There are two internal factors in the modernisation of Thai law: the ineffectiveness of the traditional Thai legal system and the prestige of Western legal systems.

Despite their positive attitudes towards the Three-Seal Code, Westerners distrusted the Thai administration of justice and its administrators. The existence of consular jurisdiction was the best evidence that foreign nations did not think of it as a 'civilised' one. Bowring gave a good picture of the justice system in Thailand in 1855.

[I]n a country where the authority of the sovereign is absolute, it is obvious that the organisation of the tribunals and the protecting power of legislation can afford but very inadequate security, should the supreme royal will at any time supersede the ordinary course of justice. To a great extent, also, the power of interfering with the action of the tribunals is possessed and exercised by the high nobles, according to their rank and influence.¹⁶²

The court system of Siam was in disarray: there were various courts of law each of which was under control of a government department,¹⁶³ and their jurisdictions were not clear-cut, which often resulted in jurisdictional conflicts.¹⁶⁴ There was no legal profession. Judges were governors in provincial cities and ministers or heads of government departments in the capital. Every prince had judicial power and could set up his own court at his palace.¹⁶⁵ Legal proceedings were complicated and justice was often delayed.¹⁶⁶ The lack of effective judicial organisation and independence made the system vulnerable to corruption and this corruption further aggravated the ineffectiveness of the system.¹⁶⁷ Referring to local sources, Bowring depicted the corruption situation in the Siamese judicial system in his journal saying '[b]ribery is said to flourish from the judge down to the lowest clerk, – all have their

¹⁶¹ Kasemsup, 'Reception of Law in Thailand' 291.

¹⁶² Bowring, *Kingdom and People of Siam* 170.

¹⁶³ WA Graham, *Siam: A Handbook of Practical, Commercial, and Political Information* (FG Browne 1913) 280.

¹⁶⁴ Engel, *Law and Kingship* 60–62; Boonchalermvipas, *The Thai Legal History* 168–69.

¹⁶⁵ NA McDonald, *Siam: Its Government, Manners, Customs, &c* (A Martien 1871) 50.

¹⁶⁶ Boonchalermvipas, *Thai Legal History* 169.

¹⁶⁷ Wales, *Ancient Siamese Government* 188; Gervaise, *Natural and Political History* 75.

price'.¹⁶⁸ Similarly, Reverend McDonald, who lived in Siam in the nineteenth-century for more than a decade, observed that 'the Siamese have an excellent code of civil and criminal laws [the Three-Seal Code], if they were properly enforced, but, unfortunately, the Judiciary are corrupt that justice is seldom meted out, the one paying the largest bribe generally gets the case'.¹⁶⁹ There is perhaps no better way to picture the ineffectiveness of the traditional Siamese legal system than by borrowing King Rama V (Chulalongkorn)'s own words:

In a usual fashion, any area in a junk found to be damaged by barnacles and termites will only be patched up without other areas being restored. As time goes by, along with many patching-ups, the whole ship deteriorates much more. It is high time the old planks were replaced, and it is of utmost vitality to do so as soon as possible. Failure to take such action means that the ship's condition will get even worse and hardly be recovered and its life will finally come to an end. [My translation]¹⁷⁰

The Siamese rulers realised how ineffective the Siamese legal system was and they showed enthusiasm for fixing it by following Western models. In the early nineteenth century, Prince Mongkut (1804-68), future King Mongkut was fascinated by Western knowledge and technology. During twenty-seven years as a Buddhist monk, the prince enthusiastically studied the English language and Western arts, science and literature¹⁷¹ and he 'had perhaps the greatest intellectual curiosity of all the Thai nobility'.¹⁷² After being enthroned in 1851, Mongkut did not revolutionise his country, but he helped foster an intellectual climate in Siamese society, especially within the noble class, which paved the way for the revolution during the reign of his son, Chulalongkorn.¹⁷³

Mongkut, best known today from his fictional depiction in Margaret Landon's 1944 novel *Anna and the King of Siam* and its famous musical adaptation, *The King and I*, encouraged modern education for royals and nobles¹⁷⁴ and allowed printing and circulating legal documents¹⁷⁵ which was formerly prohibited and could only be

¹⁶⁸ Bowring, *Kingdom and People of Siam* 171.

¹⁶⁹ McDonald, *Siam* 49-50.

¹⁷⁰ เจ้านายและข้าราชการกราบบังคมทูลความเห็นเปลี่ยนแปลงราชการแผ่นดิน ร.ศ. 103

และพระราชดำรัสในพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว ทรงแถลงพระบรมราชธิบายแก้ไขการปกครองแผ่นดิน (Royals and Officials' Proposal for a Reform in 1884 and King Rama V's Explanation for His Reform Policy) (Excise Department Press 1967) 92.

¹⁷¹ Wyatt, *Thailand* 161; William L Bradley, *Siam Then: The Foreign Colony in Bangkok before and after Anna* (William Carey Library 1981) 45-51; Jayanama, *Evolution* 9-10.

¹⁷² William L Bradley, 'Prince Mongkut and Jesse Caswell' (1966) 54 JSS 29, 30.

¹⁷³ Wyatt, *Thailand* 163-64.

¹⁷⁴ Bradley, *Siam Then* 82.

¹⁷⁵ Wyatt, *Thailand* 173.

revealed to the monarch and his officials.¹⁷⁶ He hired many Westerners as advisors in various government departments.¹⁷⁷ Bowring praised him for being a devoted and talented king and thought of him as a man of philosophy and literature.¹⁷⁸ Mongkut was considered to be pro-British and was referred by Brooke, the British diplomat who had failed to revise the old Anglo-Siamese Treaty during the reign of Mongkut's predecessor, as 'our own king', who would bring a more liberal policy to the country.¹⁷⁹ Nicholas Tarling believes that Siam retained its independence throughout the colonial period because of 'its interaction with the policies of the British'¹⁸⁰ and because of its ability to perceive 'the nature of European rivalry more accurately than others'.¹⁸¹

The appreciation of Western civilisation was best reflected during the reign of Chulalongkorn (1853-1910), who introduced various reforms aiming at transforming old Siam into a modern state.¹⁸² The king mainly adopted western models for his reform projects, ie creating modern-style administration, legal system, educational system and infrastructures and abolishing slavery.¹⁸³ However, unlike Japan during the Meiji Era (1868-1912) which established of the constitutional monarchy and parliamentary system as a result of the fundamental political reform, Thailand remained under absolute monarchy due to Chulalongkorn's view that Thai society was not ready for a radical political change.¹⁸⁴ During his forty-two-year reign, Chulalongkorn visited several foreign countries, particularly Europe twice, to observe European countries' polity and administration and to seek allies against France, which from time to time threatened to use military force.¹⁸⁵ He saw a reform of the legal system as his first priority since the 'principal task of

¹⁷⁶ Princess Sirindhorn, *บันทึกเรื่องการปกครองสมัยอยุธยาและต้นรัตนโกสินทร์ (Notes on the Thai Administration in Ayutthaya and Early Rattanakosin's Eras)* (Chulalongkorn University Press 2004) 82. See Huxley, 'Introduction' 9-10. See also Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nodic Din'' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 207; Ishii, 'Thai Thammasat' 151.

¹⁷⁷ Baker and Phongpaichit, *History of Thailand* 50.

¹⁷⁸ Bowring, *Kingdom and People of Siam*, vol 1, b.

¹⁷⁹ James Brooke, *The Private Letters of Sir J Brooke*, vol 2 (Richard Bentley 1853) 304.

¹⁸⁰ Tarling, 'Establishment of the Colonial Régimes' 46.

¹⁸¹ *ibid* 50.

¹⁸² Baker and Phongpaichit, *History of Thailand* 52; Wyatt, *Thailand* 197.

¹⁸³ Baker and Phongpaichit, *ibid*; Wyatt, *ibid* 192-97; Engel, *Law and Kingship* 33.

¹⁸⁴ King Chulalongkorn, 'พระบรมราชาธิบายว่าด้วยความสามัคคี (King Chulalongkorn's View on Solidarity)' in Thammasat University (ed), *ประวัติศาสตร์และการเมือง (History and Politics)* (Thammasat UP 1973) 173. See also Engel, *Law and Kingship* 19-20; Prachoom Chomchai, 'Introduction' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 63-64.

¹⁸⁵ Wuttichai Moonsin, *พระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัวเสด็จประพาสยุโรป ร.ศ. 116 (2440) (King Chulalongkorn's Visit to Europe in 1897)* (Ton Aor 1999) 17-18.

modernising Siam was to establish a good law and merciful judicial system and an effective administration of justice'.¹⁸⁶ To implement the law and justice reforms he wanted, the king needed trained manpower. For this reason, he began to send his children, nobles and government officials to study law abroad, mainly in Great Britain because of its predominance in Thailand.¹⁸⁷ The first Thai student who studied law in England in 1882 and was called to the bar was Khun Luang Phraya Kraisi. In 1885, Prince Rabi (1874-1920), a son of King Chulalongkorn was sent to study law at Christ Church, University of Oxford.¹⁸⁸ After returning to Thailand, the prince became a pioneer of the modernisation of Thai law.¹⁸⁹

3. THE MODERNISATION OF THE THAI LEGAL SYSTEM

The modernisation of the Thai legal system began with reforms of the administration of justice and legal education. Codification was the last stage of the reform programme. The modernisation of Thai private law was not an isolated process but part of a series of reforms of substantive law. In order to have a full picture of the reform of Thai private law, a brief overview of the reforms of the administration of justice and legal education is needed.

3.1 The administration of justice in Thailand

The greatest reform of the judicial system during Chulalongkorn's reign took place in 1892 when the Ministry of Justice was established as part of the modernisation of Siamese government.¹⁹⁰ Walter Graham, who lived in Siam during the period of the reform, observed that the 'introduction of reforms met with many grave initial difficulties and it was not until the end of 1894 that a new scheme of judicial

¹⁸⁶ King Chulalongkorn, *การเสด็จประพาสยุโรปของพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว ร.ศ. 116* (King Chulalongkorn's Visit to Europe in 1897) (Department of Fine Arts 2008) 306–08; See also Engel, *Code and Custom* 2.

¹⁸⁷ Amarinratana, 'Sending of Students' 55–56.

¹⁸⁸ Dusadi Leelamien, 'การศึกษากฎหมายในประเทศไทยตั้งแต่การปฏิรูประบบกฎหมายและการศาลในรัชสมัยพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว (Legal Education in Thailand since the Modernisation of Thai Law during the Reign of King Chulalongkorn)' in *100 ปี โรงเรียนกฎหมาย (A Hundred Years of the Thai Law School)* (Institute of Legal Education of The Thai Bar 1999) 51.

¹⁸⁹ In Thailand, Rabi has been widely regarded as 'the Father of Thai Law'. See Kasemsup, 'Reception of Law in Thailand' 292.

¹⁹⁰ Government Gazette (10 April 1892) Book 9, 9-11; Engel, *Law and Kingship* 66–67; Hooker, 'Europeanization' 552.

administration had been drawn up and sanctioned and new Courts constituted in accordance therewith, had been established even in Bangkok town'.¹⁹¹ The Ministry of Justice played the central role of judicial administration; it consolidated judicial power which was formerly vested in various courts and government departments and centralised judicial activities.¹⁹² The entire judicial system was reorganised and systematised. The number of courts was reduced from sixteen to seven all of which were under the control of the Ministry of Justice, which took charge of all matters ranging from the appointment of judges to administrative work of court officials. In terms of hierarchy, there were two appeal courts and five courts of first instance, but in terms of the nature of disputes, the courts of first instance consisted of one criminal court, two civil courts, one revenue court and one International Court.¹⁹³ For this reason, a department was established within the Ministry of Justice to admit and classify complaints.¹⁹⁴ This modernisation of judicial administration mainly took place in the capital while the reforms of provincial courts did not begin until 1896.¹⁹⁵

Following the establishment of the Ministry of Justice, Chulalongkorn adopted his foreign General Adviser Gustave Rolin-Jacquemyns's recommendation to set up a government body to take care of legislative work in 1894.¹⁹⁶ Under the Legislative Council Act of 1894, a council was appointed and empowered to debate and agree on bills within the scope of its capacity determined by the monarch who alone had absolute legislative power to pass any law.¹⁹⁷ The Legislative Council consisted of all ministers and other members, including some foreign advisors, appointed by the king. The Council set up a committee which usually had at least one foreign member to draft a law on an ad hoc basis.¹⁹⁸ Many important statutes, mainly procedural law, were drafted by this legislative body prior to codification, for example the 1895 Law of Evidence, the 1895 Law on the Organisation of the Provincial Courts, the 1896 Transitory Civil Procedure Law and the 1896 Transitory

¹⁹¹ Graham, *Siam* 281–82.

¹⁹² PW Thornely, *The History of a Transition* (Siam Observer 1923) 161; Engel, *Law and Kingship* 60, 67.

¹⁹³ Ministry of Justice, *100 ปี กระทรวงยุติธรรม* (100 Years of the Ministry of Justice) (Ministry of Justice 1992) 26–27.

¹⁹⁴ Ministry of Justice, *100 Years* 27.

¹⁹⁵ Engel, *Law and Kingship* 69; Graham, *Siam* 282; Hooker, 'Europeanization' 553.

¹⁹⁶ Salao Rekaruji and Udom Pramuanwittaya, *30 เจ้าพระยา* (30 Chao Phrayas) (Krungton 1961) 595–96.

¹⁹⁷ King Chulalongkorn, 'Royal Decree on the Establishment of the Legislative Council' in Satien Vichailuck (ed), *ประชุมกฎหมายประจำศก* (Yearly Collection of Laws), vol 14 (Neetivej 1935) 213. See also Engel, *Law and Kingship* 43–48.

¹⁹⁸ Chanhom, 'Codification in Thailand' 116.

Criminal Procedure Law. The three procedural laws including the Law of Evidence were modelled on English law.¹⁹⁹ The enactment of the Transitory Civil Procedure Law of 1896 marked the start of a distinction between civil and criminal cases since the law defined civil cases as those with no request for criminal punishment.²⁰⁰

Because its members were senior government officials who were already busy with their day-to-day work, the Council often faced problems of quorum and its legislative work was transferred to the cabinet in 1900 before being discontinued.²⁰¹

It is worth noting that, because of a lack of manpower, Chulalongkorn relied heavily on foreign experts to push the early reforms of the Thai legal system through.²⁰² Rolin-Jacquemyns,²⁰³ the king's first foreign General Adviser from 1892 to 1901, was instrumental in the making of modern Thai law.²⁰⁴ Westerners worked in various positions ranging from judges in courts, advisers in governments departments responsible for the administration of justice to law professors. The Ministry of Justice hired forty-three foreign advisors between 1900s and 1930s: there were twenty-three Britons and nineteen Frenchmen.²⁰⁵ The predominance of the British and French in the positions relating to the administration of justice and judicial system reflects the Siamese government's diplomatic policy to keep the balance between the two main powers and the effects of the French and British treaties and agreements, which required the Siamese government to appoint French and British nationals as judges in courts and legal advisers. The modernisation of Thai law was in fact linked to the ultimate aim of the Siamese government which was to preserve the country's independence.

¹⁹⁹ Sansern Kraichitti, 'The Legal System in Thailand' (1967) 7 Wahburn LJ 239, 241.

²⁰⁰ King Chulalongkorn, 'Royal Decree on the Transitory Civil Procedure Law' in Satien Vichailuck (ed), *ประชุมกฎหมายประจำศก* (Yearly Collection of Laws), vol 15 (Neetivej 1935) 157. See also Engel, *Law and Kingship* 79.

²⁰¹ Chanhom, 'Codification in Thailand' 118.

²⁰² Hooker, 'Europeanization' 552, 564; Baker and Phongpaichit, *History of Thailand* 68–69.

²⁰³ Rolin-Jacquemyns (1835-1902) was a Belgian lawyer, diplomat and Minister of Interior Affairs and a founder of *Institut de Droit International* before he came to Siam. His contribution to the modernisation of Siam and the preservation of Siamese independence was greater than that of any other foreigner and was recognised by Chulalongkorn, who bestowed a highest non-royal rank of Siamese hierarchy upon him, the *Chao Phya Abhai Raja*. He was the first and only foreigner to receive such highest honour since the seventeenth century. See Walter EJ Tips, *Gustave Rolin-Jacquemyns and the Making of Modern Siam: The Diaries and Letters of King Chulalongkorn's General Advisor* (White Lotus 1996).

²⁰⁴ Engel, *Law and Kingship* 59.

²⁰⁵ Ministry of Justice, *100 Years of the Ministry of Justice* 89–91.

3.2 Legal education

Since he saw manpower as a crucial factor for successfully modernising Siam, Rolin-Jacquemyns proposed Western education programmes for Chulalongkorn's sons,²⁰⁶ including Rabi, who spent two years studying Latin, English and French in Edinburgh between 1886 and 1888²⁰⁷ and went back to Great Britain for a second time to study law at Oxford between 1891 and 1894.²⁰⁸ In 1897, the Belgian General Advisor recommended that the king should establish a law school to produce professional judges and lawyers.²⁰⁹ Chulalongkorn accepted this recommendation and in the same year Rabi, then Minister of Justice, established the first law school in Siam. The law school was not a government body²¹⁰ but rather a private school of the prince who took care of both its administration and curriculum himself and allowed it to run in the Ministry of Justice's premises.²¹¹ Since the school was associated with the Minister and Ministry of Justice, it was known as the Law School of the Ministry of Justice. The school mainly taught English law and some traditional Thai law, especially on the Three-Seal Code.²¹² Rabi gave lectures on various subjects and authored several books on the principles of English law used at the school.²¹³ Civil-law lectures were sometimes given by some visiting European legal advisors of the Siamese government.²¹⁴ Those who passed the final exams of the law school were recognised as Siamese barristers,²¹⁵ and almost all of them served as judges in different courts.²¹⁶ Given the prince's academic background, his profound influence at the Ministry of Justice and Law School, and the general trend towards sending Thai students to study law in England, the predominance of English law in Thai legal education before codification is not surprising. It is also

²⁰⁶ *ibid* 88.

²⁰⁷ National Archive of Thailand, Department of Royal Private Secretary, Special Book No 17, 'หนังสือจากกรมหลวงเทววงษ์ศิริโปการ ถึงพระยาไชยสุรินทรและหมอกาแวน (Letter from Prince Devavonse to Phraya Chaisurindhorn and Dr Peter Gawan' (29 June 1885) 99-100.

²⁰⁸ Nikorn Tatsaro, *พระเจ้าบรมวงศ์เธอ พระองค์เจ้ารพีพัฒนศักดิ์ กรมหลวงราชบุรีดิเรกฤทธิ์* (Prince Rabi) (Nanmee Books 2006) 83.

²⁰⁹ Laor Kriruk, *เรื่องของเจ้าพระยามหิธร* (Chao Praya Mahidhorn's Stories) (Trironnasarn 1956) 51.

²¹⁰ Luang Saranaiprasas, *พัฒนาการการศึกษากฎหมายในประเทศไทย* (The Development of Legal Education in Thailand) (Thammasat University 1956) 3.

²¹¹ Leelamien, 'Legal Education in Thailand' 79.

²¹² Thanin Kraivixien, *การปฏิรูประบบกฎหมายและการศาลในรัชสมัยพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว พระปิยะมหาราช* (The Reforms of Law and Judicial Administration during the Reign of King Chulalongkorn) (Ministry of Justice 1968) 28.

²¹³ Leelamien, 'Legal Education in Thailand' 82.

²¹⁴ National Archive of Thailand, 'Georges Padoux's Memorandum on the Question on Legal Education in Siam' (20 Dec 1913) Kor Tor 35.10/10, 142.

²¹⁵ Leelamien, 'Legal Education in Thailand' 87.

²¹⁶ *ibid* 95-97.

not unexpected that lawyers and judges produced by the first Thai law school were learned men of English law.

The dominance of English law in the early stages of legal education in Siam apparently contrasted with the Siamese government's policy to adopt European codes as the model for Thai codes and this displeased French diplomats and advisors. This is illustrated by the proposal for a reform of legal Education in Thailand made by Georges Padoux, a French legislative adviser to the Thai government and the head of the draftsmen of the Thai Penal Code of 1908 and the civil and commercial code. Four years after the first code, the Penal Code of 1908, which was mainly modelled on European codes, came into force, Padoux submitted a memorandum on the 'Question of Legal Education in Siam' to the Minister of Justice. He described the legal education system in Siam at the time saying²¹⁷

The largest number have been educated in Bangkok or have taken their degrees in the Bangkok law school [the Law School of the Ministry of Justice]. They have learned the Siamese Family, Inheritance and Land law from Siamese professors. As to the general theories of law, lectures have been delivered in the Bangkok law school by Siamese lawyers educated in England or sometimes by European Advisers. Those who know the English Language have completed their training by reading English Law books. The best men have been sent to England where they have spent several years studying English law finally being admitted as Barrister – at – law. In one way or the other the technical training of the Siamese Judges is almost exclusively based on English methods and English Law.²¹⁸

Padoux saw Japanese legal education as a good example of the legal education system that was consistent with the style of the codes which were mainly modelled on European codes and kept a balance between the three major systems, German law, French law and English law, each of which had a native professor at the Japanese law school.²¹⁹ He found the current law programme at the Siamese law school inadequate and therefore proposed a reform of legal education modelled on a European programme of law.²²⁰

²¹⁷ It is worth noting that by 1913, when Padoux submitted his memorandum, Prince Rabi no longer held any position at the Ministry of Justice and the Law School.

²¹⁸ 'Georges Padoux's Memorandum on the Question on Legal Education' 142.

²¹⁹ *ibid* 149.

²²⁰ *ibid*.

Now, it is a very important point for the Siamese Government that the new legal system to be derived from the Codes be properly applied. The enactment of a large and comprehensive body of Civil, Commercial and Criminal Law would have but an unsatisfactory effect if the Judges entrusted with the decision of the cases were not familiar with the spirit and characteristics of the Code system.²²¹

The proposal was readily approved by Chulalongkorn's successor, King Vajiravudh (Rama VI).²²² Two changes were introduced.²²³ First, the government began to send Thai students to study in other Western countries, namely France and the US and, second, it attempted to reform the curriculum. However, the changes did not produce any dramatic effect as we can see from the number of Thai students who were sent to study law abroad between 1913 and 1925. Out of sixteen students, twelve students went to England and only four studied in France and in the US,²²⁴ including Pridi Banomyong ('Pridi')²²⁵ who was sent to France in 1920 and who later became instrumental in the rise of French jurisprudence in the Thai legal system.²²⁶ The curriculum especially in relation to private law did not undergo a significant change since Thailand did not have a civil and commercial code until 1923. We also need to consider that by the time that the changes were introduced almost all the Thai judges were already familiar with English law.

A major reform of Thai legal education took place after the promulgation of the Civil and Commercial Code of 1923, the controversial code of French draftsmen, which was repealed two years later. In 1924, the king set up a council of jurists named 'สภานิติศึกษา' (the Council of Legal Studies) to administer the Law School of the Ministry of Justice and its programmes of studies in accordance with the civil-law system.²²⁷ The Council introduced French law courses as alternatives to English law courses. English law was no longer the predominant foreign law taught at the Law School, but the new legal education policy did not significantly reduce English law's

²²¹ *ibid* 145.

²²² National Archive of Thailand, Ministry of Justice Doc No Yor 1/1, 'พระราชหัตถเลขา

พระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว พระราชทานกรมหลวงสวัสดิ์คั่นวิศิษฐ์ (Letter from King Vajiravudh to Prince Svastiwatvisit)' (18 March 1913).

²²³ Leelamien, 'Legal Education in Thailand' 111.

²²⁴ National Archive of Thailand, Ministry of Justice Doc No Yor 2 10/3,

'จำนวนนักเรียนไทยไปศึกษากฎหมายในต่างประเทศระหว่าง 22 มีนาคม 2455 และ 22 พฤษภาคม 2468' (The Number of Thai Students Sent to Study Law Abroad between 22 March 1913 and 22 May 1925).

²²⁵ Pridi Banomyong (1900–83), a doctor of law from Paris, was a leader of the revolution of 1932, which changed the system of government from an absolute monarchy to a constitutional monarchy. He was Prime Minister briefly in 1946. He established Thammasat University to promote free higher education and democracy in 1934.

²²⁶ Chanchai Sawaengsak, *อิทธิพลของฝรั่งเศสในการปฏิรูปกฎหมายไทย* (French Influence on the Reforms of Thai Law) (Nititham 1996) 117.

²²⁷ Government Gazette (10 August 1924) Book 41, 53-55.

influence. The Law School, in fact, kept a balance between these two legal systems since in each of the first three terms law students had to study certain foreign law courses in both English and French versions.²²⁸ The reason for maintaining English law and introducing only French law as an alternative foreign law to the former was political. The British agreement of 1925 required that the Siamese government hire English law professors to teach at the Law School and in the absence of Thai civil and commercial law the Siamese courts had to apply English law²²⁹ while France asked the Siamese government to establish a department of legislative redaction, reform the curriculum, and hire Frenchmen to be managing director, law professors of the Law School and legislative adviser to the Ministry of Justice.²³⁰

In 1933, King Prachadhipok (Rama VII), the successor of Vajiravudh transferred the Law School of the Ministry of Justice to a newly-established faculty at Chulalongkorn University entitled ‘คณะนิติศาสตร์และรัฐศาสตร์’ (Faculty of Law and Political Science).²³¹ Nevertheless, in the next year, with Pridi’s initiative, Thammasat University²³² was established, and it took over Chulalongkorn University’s Faculty of Law and Political Science²³³ making Thammasat University the only Thai university offering a bachelor degree in law until 1971.²³⁴ Pridi became the first President of Thammasat University and exerted a profound influence over the university management and administration of education.²³⁵ Thammasat University’s curriculum of legal studies was considerably remodeled in accordance to the civil-law system, especially French law.²³⁶ As a result, the influence of English common law in Thailand declined despite the fact that many Thammasat law

²²⁸ Luang Saranaiprasas, *Development of Legal Education* 43–46.

²²⁹ Ministry of Foreign Affairs, Letter from Prince Tridos to Chao Phraya Mahidorn (2 July 1925) cited in Foran, ‘Amendment of Extraterritoriality Clauses’ 181.

²³⁰ Ministry of Foreign Affairs, Letter from Prince Tridos to Chao Phraya Mahidorn (10 September 1923) cited in Foran, *ibid* 158–59.

²³¹ Prasit Kowilaikul, ‘การศึกษากฎหมายในคณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย (Legal Education in Chulalongkorn University Faculty of Law)’ in *100 ปี โรงเรียนกฎหมาย (A Hundred Years of the Thai Law School)* (Institute of Legal Education of The Thai Bar 1999) 130.

²³² The original name of Thammasat University (มหาวิทยาลัยธรรมศาสตร์) is the University of Moral and Political Science (มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง). The name was changed by the military government after a *coup d’état* in 1947.

²³³ Thammasat University Act of 1934, art 5.

²³⁴ Ramkhamhaeng University was established in 1971 with a law degree offered, and in 1972 Chulalongkorn University successfully established a law faculty.

²³⁵ Sawaengsak, *French Influence* 136. See also Charnvit Kasetsiri, ‘ปริดี

พนมยงค์กับมหาวิทยาลัยธรรมศาสตร์และการเมือง (Pridi Banomyong and the University of Moral and Political Sciences)’ in Thamrongsak Petchlertanan (ed) *ปริดี ป่วย กับธรรมศาสตร์และการเมือง (Pridi and Puey and the University of Moral and Political Sciences)* (Thammasat University Archive 2006) 10–30.

²³⁶ Thammasat University, *แนวทางการศึกษาชั้นปริญญาตรี โท และเอก ของ มหาวิทยาลัยวิชาธรรมศาสตร์และการเมือง (Bachelor Master and Doctoral Programmes of Thammasat University)* (Sri Krung 1934) 1–69.

professors were judges who were educated in England or students of English law. French law replaced English law as the predominant foreign jurisprudence in Thailand. By 1987, France was the most popular destination for higher legal education among Thammasat law scholars.

3.3 Codification of civil and commercial law in Thailand

Chulalongkorn realised that the reorganisation of the judicial system was not sufficient to 'equip Siam for its Future in the late nineteenth century'.²³⁷ Hence following the reforms of the judicial administration and the establishment of the Law School, the king carried out the next phase of the modernisation of Thai law, the reforms of substantive law. The project began with codification of criminal law in 1898 in the hope that criminal law, which is by comparison easier to make and to understand would help the Siamese, who had no prior knowledge of the code system, to adapt to the new environment.²³⁸ Nevertheless, before the work of codification began, a question had to be answered, would Siam adopt a common-law or civil law system? There was a fierce debate over this question. Rabi, then Minister of Justice and the administrator of the Law School of the Ministry of Justice, was the most influential figure in Thailand's legal community. The English-law-educated prince preferred the English system while the king's French and Belgian advisers promoted the French system.²³⁹ Rabi wrote to his father urging him to adopt the common law system:

In my opinion, despite my appreciation of the code system, as everyone may know, codification is an unachievable task. One reason is that making a code is even more difficult than making a railway from Bangkok to Phetchaburi [a province around 123 km from Bangkok] or making a pond in Bangkok. It took the Germans twenty years to make the BGB and the Japanese fifteen years to make a civil code while the code of India has yet to be finished. Another reason is that codification is costly and it is almost certain that the finance department won't be happy with this...Although we can successfully make a code, government officials won't be satisfied with it; the code may be useful to the people, but it is too rigid for the officials who will be required to work along the same lines. I suspect that our government system is not ready for it.²⁴⁰ [My translation]

²³⁷ Hooker, 'Europeanization' 551.

²³⁸ René Guyon, *The Work of Codification in Siam* (Imprimerie Nationale 1919) 27.

²³⁹ Wyatt, *Thailand* 195.

²⁴⁰ National Archive of Thailand, Ministry of Justice Doc No Yor 23/3,

'พระราชหัตถเลขากรมหมื่นราชบุรีดิเรกฤทธิ์ ถวายพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว (Letter from Prince Rabi to King Chulalongkorn)' (2 December 1904).

Despite this plea, the king found traditional Thai law, particularly the Three-Seal Code, similar to European codes and decided to adopt the code system as the model for Thai modern codes. This decision dismayed Rabi, who later withdrew from the drafting of the Penal Code.²⁴¹ His withdrawal allowed French domination in the work over the next twenty years.

The drafting of the Penal Code, which began in 1898, went relatively smoothly and was completed in 1908. The first drafting committee chaired by Rabi contained no French nationals and although it completed the draft of a penal code its draft was never put into effect due to some disruptions, for example the quorum problem of the Legislative Council and the negotiation between the Siamese and French governments to revise the extraterritorial clause.²⁴² Following the French agreement signed in 1904, the Siamese government accepted the French proposal to appoint Padoux as a legislative adviser in exchange for an amendment of the Franco-Siamese Treaty²⁴³ and it set up a new drafting committee led by the Frenchman.²⁴⁴ Despite the predominance of Padoux in the committee, the Code was drafted in the English language, which was the common language between Thai and foreign officials, before being translated into Thai.²⁴⁵ The work of codification of criminal law was completed in 1907 and the Penal Code came into force in 1908. The Penal Code of 1908 did not focus on any particular legal system, but the previous draft of a penal code and a variety of foreign criminal laws were taken into account with the dominance of the Belgian, Indian, Italian, French, Dutch, Egyptian and Japanese Penal Codes.²⁴⁶

Following the promulgation of the Penal Code of 1908, Padoux was tasked with drafting a civil and commercial code. He was assisted by four other Frenchmen, including René Guyon (1876-1963), who was active in all subsequent drafting

²⁴¹ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/1,

‘พระราชหัตถเลขากรมพระสวัสดิวัดนวิศิษฎ์ ถวายพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว

เรื่องข้อเสนอลาดูซึ่งเกี่ยวกับการจัดระบบการศึกษากฎหมาย (Letter from Prince Svastiwatvisit to King Vajiravudh on Georges Padoux’s Memorandum on the Question on Legal Education in Siam)’ (15 March 1914).

²⁴² Chanhom, ‘Codification in Thailand’ 167–79.

²⁴³ National Archive of Thailand, Miscellaneous Doc No Bor 9/115,

‘หนังสือจากกรมหลวงเทเวศร์วโรปการ ถึงพระเจ้าน้องยาเธอกรมขุนสมมตอมรินทร์ (Letter from Prince Devavonse to Prince Sammuta Amornbhan)’ (9 December 1904).

²⁴⁴ J Stewart Black, *Report for the Year 125 (1906-07)* (Ministry of Justice 1907) 9–10.

²⁴⁵ Black, *ibid* 10; G Padoux, *Report on the Proposed Penal Code for the Kingdom of Siam Submitted to His Royal Highness Prince Rajburi Direkrit, Minister of Justice* (Ministry of Justice 1906) 7.

²⁴⁶ Padoux, *ibid* 8.

committees of the civil and commercial code.²⁴⁷ Realising that the Thai government was struggling to end extraterritoriality and urgently needed contract law to deal with commercial activities, Padoux proposed that his drafting committee could rush to finish the work of codification within four years (early 1913) and start with the drafting of the law of obligations which may be promulgated earlier than the other parts.²⁴⁸ In 1910, there was a reorganisation of the government bodies responsible for codification. The government set up the codification commission which had six divisions under it, but the drafting responsibility remained with the French draftsmen led by Padoux.²⁴⁹ In 1913, the work of codification was disrupted by Padoux's resignation and return to France and the First World War made it difficult for the Thai government to find a replacement for him. By the time he left the country, Padoux managed to draft one thousand three hundred and thirty-five articles which provided the basis for subsequent drafts of the Civil and Commercial Code of 1923.²⁵⁰ Even though another French lawyer was appointed as the new chief draftsman a year later, from the viewpoint of then Minister of Justice, his ability was by no means comparable to Padoux's. The drafting of the civil and commercial code went nowhere between 1914 and 1916.²⁵¹

In 1916, a major change was made to the drafting committee. The French chief draftsman was dismissed and replaced by Prince Svastiwatvisit, then President of the Supreme Court, and three eminent Thai jurists, namely Phraya Jindabhirom Rajasabhabordi (Chitr)²⁵², then Chief Justice of the Central Civil Court, Phraya

²⁴⁷ National Archive of Thailand, Miscellaneous Doc No Bor 9/89, 'หนังสือจากพระยาจักรปาฬิศริลวิสุทธิ กราบบังคมทูลพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว (Letter from Phraya Chakkapani to King Chulalongkorn)' (16 April 1907).

²⁴⁸ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/8, 'บันทึกนายชอร์ซ ปาดูซ์ เรื่องข้อเสนอนในการจัดทำประมวลกฎหมายแพ่งและพาณิชย์ (Georges Padoux's Proposal on the Drafting of the Civil and Commercial Code)' (20 July 1909) 2-3.

²⁴⁹ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/2, 'หนังสือจากพระองค์เจ้ารณยุทธศักดิ์ กฤดากร กราบบังคมทูลพระบาทสมเด็จพระจุลจอมเกล้าเจ้าอยู่หัว (Letter from Prince Charoonsak to King Chulalongkorn)' (8 August 1910).

²⁵⁰ See National Archive of Thailand, Office of the Council of State Doc No 9, 'การร่างและพิมพ์ประมวลกฎหมายแพ่งและพาณิชย์ (The Drafting and Publishing of the Civil and Commercial Code)' (around January 1925). This document is apparently a Thai translation of an English memorandum mostly likely written by Guyon because it accompanies the Thai translation of an English letter from Guyon to Francis Sayre, then Foreign Affairs Advisor to the Thai Government. Unfortunately, the English copy was missing. See National Archive of Thailand, Office of the Council of State Doc No 9, 'Letter from René Guyon to Francis Sayre' (10 January 1925).

²⁵¹ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/2, 'บันทึกของพระองค์เจ้ารณยุทธศักดิ์ กฤดากร กราบบังคมทูลพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (Letter from Prince Charoonsak to King Vajiravudh)' (5 May 1916).

²⁵² *Phraya* was a Siamese noble rank for commoners, second only to the rank of *Chao Phraya*. The system of noble ranks was abolished in 1942. 'Jindabhirom Rajasabhabordi' was, for example, an official name given by the monarch.

Noranaeti Banjakit (Lad), then judge of the Supreme Court and Phraya Dhebvitoon Pahoolsarutabordi (Boonchoi), then Attorney General, were added to the drafting committee in addition to the existing three French draftsmen.²⁵³ Chitr, Lad and Boonchoi had all received their legal education at the Law School of the Ministry of Justice and then in England and were all English barristers. The chairman of the drafting committee gave Guyon the important role of chief advisor, which was effectively the chief draftsman.²⁵⁴ The drafting committee revised and translated the Padoux draft of the law of obligations and the law of contract.²⁵⁵ The work of codification would have made progress if chairmanship of the drafting committee had remained unchanged, but Prince Svastiwatvisit's resignation in 1918 caused disruption. Vajiravudh decided to introduce another major reform to the codification commission. The king thought that a commoner rather than a royal, who was usually occupied with day-to-day work, should direct the work of codification and asked Chao Phraya Abhai Raja, then Minister of Justice, to also be the president of the codification commission in 1919. Chao Phraya Abhai Raja reorganised the commission by reducing the divisions from six to three divisions, namely the drafting division (the drafting committee), the translation division and the Thai revisions division.²⁵⁶ The members of the drafting committee remained unchanged except that Guyon was appointed as the chief draftsman.²⁵⁷ The president of the codification commission also appointed Phraya Manavarajasevi (Plod), Chitr's younger brother, as the secretary of the commission, the position which was previously held by a French draftsman. Plod, a Thai and English barrister, became instrumental in the Siamese government's policy switch from French-oriented to German-oriented codification and played a leading role in the successful drafting of the Code of 1925. Plod's role in the making of the Code is the focus of this thesis and will receive careful scrutiny in the next chapter.

Under the direction of Guyon, the drafting committee completed the draft of the first two books of the Civil and Commercial Code in 1923, which contained three hundred and eighty-seven provisions. The English draft was then translated into Thai by the translation committee (known as the High Revising Committee) comprised of a number of royals who were also head of ministries and

²⁵³ Government Gazette (7 May 1916) Book 33, 40.

²⁵⁴ Guyon, *Work of Codification* 10.

²⁵⁵ Pakdi Phagagrang, 'การจัดร่างประมวลกฎหมายแพ่งและพาณิชย์: พ.ศ. 2451-2478 (The Drafting of Siamese Civil and Commercial Code: 1908-1935 AD)' (MA Thesis, Silpakorn University 1994) 53.

²⁵⁶ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/2,

'พระราชหัตถเลขาพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว ถึงกรมหลวงเทวะวงศัวโรปการ (Letter from King Vajiravudh to Prince Devavongse)' (21 April 1919).

²⁵⁷ Guyon, *Work of Codification* 10.

department.²⁵⁸ The draft of a civil and commercial code which was prepared by the draftsmen led by a Frenchman and with the French majority was principally based on the French Civil Code. Plod found the French draft unsystematic and incomprehensible and convinced the king and his ministers to redraft a new civil and commercial code modelled on German and Japanese law.²⁵⁹ An agreement between the French and Thai governments signed in September 1923, which required the latter to establish a department specifically responsible for legislative redaction,²⁶⁰ gave the Thai government a chance to change the composition of the drafting committee, which was dominated by the French. In October 1923, the codification commission became the Department of Legislative Redaction. The Department was run by a committee which mostly consisted of the previous draftsmen. However, Guyon was no longer the chief draftsman and had only an advisory role as chief advisor. Abhai Raja, then Minister of Justice, headed the committee himself.²⁶¹

In November 1923, the Thai government decided to put the French draft into effect for political and technical reasons. The government could not simply announce that the work of the French draftsmen was imperfect but needed widespread criticism from Thai legal profession, especially judges, to set it aside. While waiting for feedback it put the French draft into effect to show the French government goodwill. Strong criticism of the Civil and Commercial Code gave the king an excuse for postponing its effective date.²⁶² The new drafting committee dominated by Thai jurists then proceeded to draft a new civil and commercial code. They spent about seven months redrafting two books of the civil and commercial code and the new draft, which was mainly founded on German jurisprudence, came into effect in 1925. It is still in use until today. The drafting of the Code of 1925 is the main focus of this thesis since it shows how modern private law in Thailand developed and considers whether Watson's theory of legal transplants adequately explains legal change in Thailand. These will therefore be thoroughly discussed subsequent chapters.

²⁵⁸ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/2, 'หนังสือเจ้าพระยาอภัยภูธรกราบบังคมทูลพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (Letter from Chao Phraya Abhai Raja to King Vajiravudh)' (28 August 1919).

²⁵⁹ Phraya Manavarajasevi, *บันทึกคำสัมภาษณ์พระยามานวราชเสวี* (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982) 3–4, 28–30.

²⁶⁰ Foran, 'Amendment of Extraterritoriality Clauses' 159.

²⁶¹ Government Gazette (28 October 1923) Book 40, 128–30.

²⁶² This will be discussed in greater detail in the next chapter.

It is worth noting that due to the lack of publications of legal texts and statutes in Thailand, Thai law was almost unknown to the public and even Thai lawyers.

Padoux in 1909 observed that

Every foreigner who has to deal with Siamese legal questions knows that it is extremely difficult to get reliable information about the existing Siamese statute law...Very few Siamese lawyers have a full knowledge of Siamese law...From my personal practice as a Judge in the Bangkok Appeal Court I knew that even in matters governed by rather modern texts, I mean laws enacted during the last 15 years, it is most common to the ordinary Judge to give judgment without quoting the law or even making any allusion to its existence.²⁶³

Before the promulgation of the Code of 1925, it was common for the Thai courts to adopt English law and the principle of judicial precedent to decide civil and commercial disputes which had foreigners involved on a case-by-case basis.²⁶⁴ When they applied English law they simply stated, without any acknowledgement of the source of law, 'According to the law' rather than 'According to English law'.²⁶⁵ The agreement between the British and Siamese governments only required the Siamese courts to apply English private law where there was no applicable Thai law, but they usually resorted to English law despite the availability of Thai law.²⁶⁶ The predominance of English law at the Siamese courts was not unsurprising given that the legal education of Siamese judges and lawyers prior to the promulgation of the Code of 1925 was overwhelmingly influenced by English jurisprudence.

CONCLUSION

Watson's explanation of how legal change occurs accurately explains the modernisation of Thai law in general. We have seen that the reforms of law in Thailand from the late nineteenth century to the early twentieth century were directed by ruling and professional elites who felt impelled to modernise the country to regain full judicial autonomy. Most of the steps taken by the Thai governments to reform the traditional Thai legal system were influenced by external

²⁶³ 'Georges Padoux's Proposal on the Drafting of the Civil and Commercial Code' 15-16.

²⁶⁴ *ibid* 16; Kasemsup, 'Reception of Law in Thailand' 292.

²⁶⁵ Preedee Kasemsup, *นิติปรัชญา (Philosophy of Law)* (Thammasat University Faculty of Law 2000) 49. See also Kittisak Prokati, *การปฏิรูประบบกฎหมายไทยภายใต้อิทธิพลยุโรป (The Modernisation of Thai Law under the European Influence)* (2nd edn, Winyouchon 2006) 112.

²⁶⁶ 'Padoux's Proposal on the Drafting of the Civil and Commercial Code' 16.

pressure, for example extraterritoriality and agreements with foreign governments which usually required involvement of their own people in the modernisation process. This condition had implications for the reception of foreign private law in Thailand and the development of Thai private law, which will be discussed in subsequent chapters. However, to understand fully why Watson is correct, one needs to consider the social and political conditions of traditional Thai society, which was a paternal society ruled by an absolute monarch. Legislation had long been kept from ordinary Thai people and was only allowed to be published and circulated a few decades before the modernisation of law began.

CHAPTER 3

THE MAKING OF THE CIVIL AND COMMERCIAL CODE OF 1925: METHODOLOGY FOR DRAFTING

INTRODUCTION

Following strong criticism of the Civil and Commercial Code of 1923 ('Code of 1923'), which was mainly drafted by French draftsmen and in accordance with French jurisprudence, a new drafting committee for the civil and commercial code, led by three Thai jurists, began its work in March 1925 and completed it in seven months. In drafting the Civil and Commercial Code of 1925 ('Code of 1925') the draftsmen followed the example of the Japanese Civil Code of 1898 ('Minpō of 1898') in the belief that the Japanese had copied the BGB. The draftsmen used a handful of English translations and commentaries on the German and Japanese Civil Codes as the main sources of information and templates for the new code. They reviewed the provisions of the Code of 1923 article by article. The articles were either redrafted or amended to agree with the wording of the model rules written in the books on which they relied.

In this chapter, Thai primary sources concerning the drafting of the Code of 1925 are examined to discover the methods which the draftsmen generally employed. The findings provide insights into the manner in which legal borrowing took place and pave the way for research on specific performance as a case study of legal borrowing in the next three chapters. It focuses not only on methods and materials which were used by the draftsmen in the work of codification but also the profiles of some members of the drafting committee who played prominent roles in this seemingly successful codification. This will shed light on why particular methods were adopted.

1. THE DRAFTSMEN OF THE CODE OF 1925

The work of codification of civil and commercial code underwent several changes especially changes of the organisations and people who were from 1908 responsible for the drafting of the code.¹ The last major change was the establishment of the Department of Legislative Redaction (กรมร่างกฎหมาย) within the Ministry of Justice in October 1923 to replace the Codification Committee. This was followed by the promulgation of the Code of 1923 in November. This organisational reform was influenced by both external and internal factors. In order to negotiate an amendment of the Franco-Siamese Treaty, the Thai government accepted a French proposal to establish a government department which was specifically responsible for law drafting and legislative works and to hire the Frenchmen who were members of the former drafting committee to work in the new department.² The French request coincided with King Vajiravudh's desire to reform the codification commission to accelerate the work of codification.³ The Department was run by a committee known as the Committee of Legislation (คณะกรรมการร่างกฎหมาย), chaired by เจ้าพระยาอภัยภูธรราชมหาบุณยธรรม (Chao Phraya Abhai Raja Mahayuttidhamdhorn) ('Abhai Raja'), then Minister of Justice. Other than Abhai Raja, the first Committee of the Department had four Thai members, namely พระยานเรนดิบัญญัติ (Phraya Noranaeti Banjakij (Lad Setabutr)) ('Lad'), พระยาจินดาภิรมย์ราชสภานิติ (Phraya Jindabhirom Rajasabhabordi (Chitr na Songkla)) ('Chitr'), พระยาเทพวิฑูรย์สุรตาสภานิติ (Phraya Dhebvithoon Pahoolsarutabordi (Boonchoi Vanikkul)) ('Boonchoi'), พระยามานวราชเสวี (Phraya Manavarajasevi (Plod na Songkla)) ('Plod'), and three French members, Charles L'Evesque, Remy de Planterose and René Cazeau. René Guyon, the former chief draftsman, became the advisor to the Committee. Plod also took care of the Committee's administrative business and was considered the first Secretary-General of the Department.⁴ According to Plod, the Thai draftsmen played a leading role in

¹ See ch 2, 3.3 'Codification of civil and commercial law in Thailand' p 81 above.

² Ministry of Foreign Affairs, Letter from Prince Tridos to Chao Phraya Mahidorn (10 September 1923) cited in Songsri Foran, 'การแก้ไขสนธิสัญญาว่าด้วยสิทธิสภาพนอกอาณาเขตกับประเทศมหาอำนาจในรัชสมัยพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (The Amendment of Extraterritoriality Clauses between the Thai and Foreign Governments during the Reign of King Rama VI)' (Chulalongkorn University 1959) 158–59.

³ Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982) 43.

⁴ Phraya Manavarajasevi, 'คำรำลึกของพระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา) (Recollection of Phraya Manavarajasevi)' in The Council of State of Thailand (ed), *ครบรอบ 48 ปี 2524*

drafting of the Code of 1925 in part because they outnumbered the Frenchmen in the Committee.⁵ The minutes of the drafting committee between March and October 1925 consistently show that all of the Committee members, except Lad and L'Evesque, who were absent throughout the drafting process, regularly attended the meetings and that the three Thai draftsmen, Chitr, Boonchoi and Plod, dominated the drafting work. Guyon attended the meetings in March and between late September and October 1925, which were the first and last months of the drafting process.⁶ Despite his irregular attendance, Guyon played a more important role in the making of the Code of 1925 than the other two Frenchmen. The focus of this part of the thesis is therefore on the backgrounds of the three Thai draftsmen, especially Plod, and of Guyon as the most influential foreign figure in the making of the Code of 1925.

1.1 Phraya Jindabhirom Rajasabhabordi (Chitr na Songkhla)

Chitr (1885 - 1976) was a prominent Thai judge and politician. He was later granted the highest title of Thai nobility as Chao Phraya Sri Dhamma Dhisej in 1931, and he was the last person on whom this was bestowed before the system of noble titles in Thailand was abolished following the Revolution of 1932.⁷ Chitr was educated at the Law School of the Ministry of Justice and qualified as a Siamese barrister before being sent by Prince Rabi to study law in England in 1906. He was called to the Bar at Gray's Inn in 1910.⁸ Upon completion of his legal education in England, Chitr spent some months studying the French language in Paris before being recalled to Thailand by the Thai government.⁹ Upon his return, Chitr was appointed as a judge at the Central Civil Court. He rose quickly in the judiciary becoming the chief justice of the Court in 1913, President of the Siamese Bar Council in 1924 and President of the Supreme Court in 1925. In 1926, Chitr joined King Rama VII's cabinet as

สำนักงานคณะกรรมการกฤษฎีกา (48 Years of the Council of State (BE 2524)) (The Council of State of Thailand 1981) 1.

⁵ Manavarajasevi, *Interviews* 4, 43.

⁶ National Archive of Thailand, Office of the Council of State Doc No 3, Book

4(2), 'รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 กันยายน ถึง 27 มีนาคม พ.ศ. 2467 (Minutes of the Meetings of the Committee of Legislation)' (1 September 1924 - 27 March 1925); *ibid* Doc No 3, Book

5(1), 'รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 สิงหาคม ถึง 27 ตุลาคม พ.ศ. 2468 (Minutes of the Meetings of the Committee of Legislation)' (1 August - 27 October 1925).

⁷ Nattawut Sutthisongkram, 29 เจ้าพระยา (29 Chao Phrayas) (Samnak Sritham 1966) 934.

⁸ Phraya Vichiensiri and Banturng Poolsilp, *อนุสรณ์งานพระราชทานเพลิงศพ*

มหาอำมาตย์เอกเจ้าพระยาศรีธรรมราชภิเษก (จิตร ณ สงขลา) (In Memory of Chao Phraya Sridhammadhibej (Chitr na Songkhla)) (Chuanpim 1976) 3-7.

⁹ *ibid* 19-22.

Minister of Justice. He was appointed to several important political positions in subsequent governments both under absolute and constitutional monarchs, for example as Minister of Finance (1933), Member and Speaker of the House of Representatives (1934), Minister of Justice three more times (1937, 1944 and 1946), Minister of Foreign Affairs (1938), Minister of Public Health (1944), Member and Speaker of the Senate House (1947), Chairman of the Constitution Drafting Council (1948), Speaker of the Parliament and President of Constitutional Tribunal (1949) and President of the Privy Council (1963).¹⁰ He also taught at the Law School of the Ministry of Justice for several decades and was appointed as a *professor extraordinarius* at Thammasat University in 1939. He wrote several law books while teaching at the Ministry of Justice Law School, including texts on the law of partnerships and companies in 1913, on the law of evidence in 1915, on the administration of courts and civil procedure 1918 and a commentary on the Code of 1923 in 1924.¹¹

Chitr was one of the first three Thai jurists who were appointed as draftsmen of the civil and commercial code since 1916.¹² Along with his brother, Plod, Chitr played a prominent role in the drafting of the Code of 1925. Despite being the President of the Committee of Legislation, Abhai Raja, then Minister of Justice, was too busy to lead the drafting meetings himself and therefore Chitr always presided over the meetings of the drafting committee. If one considers only the minutes of the meetings one may be of the opinion that Chitr was the most important figure in the drafting process since he often engaged in discussions and usually had the most persuasive voice while his brother, Plod, only occasionally expressed his opinions.¹³ However, this research will demonstrate that Plod played the leading role in the establishment of the Code of 1925.

1.2 Phraya Dhebvithoon Pahoolsarutabordi (Boonchoi Vanikkul)

Like Chitr, Boonchoi (1889-1949) was one of the first three Thai jurists who were appointed as draftsmen of the civil and commercial code since 1916.¹⁴ He was educated at the Ministry of Justice Law School and was sent with Chitr and some other Thai students by Rabi to study law in England in 1906. He completed his legal

¹⁰ *ibid* 13-19.

¹¹ *ibid* 16-18.

¹² Government Gazette (7 May 1916) Book 33, 40.

¹³ 'Meeting Minutes' (3 March - 26 October 1925).

¹⁴ Government Gazette (7 May 1916) Book 33, 40

education at Gray's Inn with a First Class Honours and was called to the Bar in 1909. Boonchoi was appointed as a judge when he returned to Thailand. He had a successful career in the judiciary being promoted to judge in the Court of Appeal and Supreme Court respectively. In 1923, he was appointed as Attorney General under the Minister of Internal Affairs and remained in the Department of Public Attorney until 1928 when he moved back to the court of justice to assume the presidency of the Supreme Court. In 1932, he briefly went into politics and joined the first cabinet under the constitutional monarch as Minister of Justice but resigned in the next year. Boonchoi played an important role at the Law School of the Ministry of Justice as a lecturer and an administrator. He wrote several important law books, for example on torts in 1910, the law of agency in 1911, *Commentary on Books I and II of the Civil and Commercial Code of 1923* and most importantly *Commentary on the Civil and Commercial Codes of 1925 from Articles 1 to 240* in 1959. Boonchoi was the only draftsman of the Code of 1925 who produced, though only partly, a commentary on it.¹⁵

1.3 Phraya Manavarajasevi (Plod na Songkla)

Plod (1890-1984) was a younger brother of Chitr. Despite the fact that Chitr presided at the drafting meetings, Plod was the architect of the Code of 1925. He introduced a new methodology to the work of codification of civil and commercial law which led to its successful enforcement. He described his role in the drafting committee and gave his account of the work of codification in a series of interviews which were crucial for later understanding of the origin of the Code of 1925.

Plod qualified as a Siamese barrister before being sent by the Ministry of Justice to study law in England in 1913. He was called to the bar at the Inner Temple in 1916. Upon his return to Thailand, he was appointed as a judge at the Siamese International Court in Bangkok briefly in 1917 before being transferred to the law department of the royal household as the deputy head of the department in the same year. In 1919, Vajiravudh appointed Plod as secretary to the Codification Commission, which was later transformed into the Department of Legislative Redaction in 1923. Unlike Chitr and Boonchoi, Plod did not take part in preparing the English draft of the Code of 1923, but from 1919 to 1921 he was assigned the task

¹⁵ Court Museum of Thailand, 'พระยาเทพวิฑูร พหลศุรดาบดี (Phraya Debvitoon Pahoolsarutabordi)' (Office of the Court of Justice)
<<http://www.museum.coj.go.th/SpPerson/witulpahun.htm>> accessed 28 December 2012.

of translating it into Thai.¹⁶ After the promulgation of the Code of 1925, Plod had a successful career in the judiciary becoming the chief justice of the Siamese International Court in Bangkok in 1926 and Privy Councillor in 1927. He was transferred to the Department of Public Attorney assuming the office of the Attorney General in 1928. Plod also played an important role in Thai politics after the change from absolute monarchy to democracy in 1932. He became a Member of Parliament in the same year and Minister of Finance in 1934. Plod was Speaker of the House of Representatives from 1936 to 1943 and Speaker of the Parliament from 1944 to 1946. He was chosen by the House of Representatives to be the Chairman of the Constitution Drafting Council in 1946. Plod was a Privy Councillor (king's advisor) of the current King of Thailand (King Bhumibol) for twenty-nine years. In academia, Plod taught at the Law School of Ministry of Justice, where he was Head of the School from 1923, Chulalongkorn University, and Thammasat University, where he was appointed as a *professor extraordinarius*.¹⁷

Some of the knowledge and experience which Plod had gained while studying in England between 1913 and 1917 was particularly vital to codification of civil and commercial law in Thailand since it provided the foundation for the new methodology for drafting the civil and commercial code in 1925 and therefore deserves attention. A group of academics from Thammasat University Faculty of Law conducted three interviews with Plod on 12 September 1980, 10 December 1980 and 16 June 1981.¹⁸ The main purpose of these was to clarify many unresolved issues about the modernisation of Thai law, especially the making of the Thai Codes during the reigns of Chulalongkorn and Vajiravudh.¹⁹

In the interviews, Plod explained why he was sent to study in England and how the Japanese method of drafting a code of law became attractive to him. Plod claimed that Prince Rabi, then Minister of Justice, sent him to study in England with the expectation that either he qualified as an English barrister and then returned to Siam to become Attorney General or that he would study German law so as to be able to draft a civil code.²⁰ If Rabi, the leading opponent of the adoption of the code system, intended to adopt German law in establishing a civil code a question arises as to why Plod was sent to England instead of Germany. The answer can be found

¹⁶ Bangkok University, *อนุสรณ์งานศพพระยามานวราชเสวี* (In Memory of Phraya Manavarajasevi) (Amarin Printing 1984) 24–39.

¹⁷ *ibid.*

¹⁸ The interviewers were Professor Predee Kasemsup, Professor Sawaeng Boonchalermvipas and Professor Kittisak Prokati and Professor Mali Prukongsawali.

¹⁹ Manavarajasevi, *Interviews* Preface.

²⁰ *ibid* 3.

in the previous chapter which showed the predominance of the British Empire in Thailand and the general trend towards sending Thai students to study law in England in the nineteenth century.²¹ The Thai were more familiar with British culture including the English language than any other foreign cultures as Plod pointed out: 'at the time, it was difficult to find a Thai student who knew foreign languages other than the English language' [my translation].²²

Despite being educated in the common law system, Plod took a positive attitude towards German law while he spoke of French law with disapproval. He said:

It is strange that a person with knowledge of English common law can easily understand the German Civil Code but finds the French Civil Code unreadable. So [I think that] the Japanese decision to choose the German Code rather than the French Code was right and we simply followed them....A good English translation of the German Civil Code was produced by Chung Hui Wang, which I have read since I studied in England and found it comprehensible....Unlike the French Civil Code, the German Civil Code is arranged from general to specific, which is easy to understand.²³ [My translation]

Despite his admiration of the BGB, it seems that Plod was not willing to study German law seriously either in Great Britain or in Germany. Plod told the interviewers that he was strongly encouraged by Rabi to further his legal studies at Heidelberg University after he was qualified as an English barrister. However, after he had spent some time learning German, which enabled him to read some German texts, Plod returned to Thailand instead of going to Germany to pursue another law degree, which he jokingly considered this a lucky escape.²⁴ He claimed to have read some German law books during his time in Britain,²⁵ but there is no indication about how much German law he knew. Despite his claim that he could read German,²⁶ his level of German reading skill was doubtful since all the books of German law that he mentioned in the interviews were published in English. Furthermore, the literature on German and Japanese law that Plod and other draftsmen consulted during the drafting of the Code of 1925 is almost all written in English. However, it can be argued that since English was the only communicating language between the

²¹ See ch 2, 3.2 'Legal education' p 77 above.

²² Manavarajasevi, *Interviews* 8.

²³ *ibid* 8–9.

²⁴ *ibid* 8.

²⁵ *ibid* 3.

²⁶ *ibid* 8.

Thai and French draftsmen, the foreign materials they consulted had to be published in English.

Besides German law, Japanese law and Japan's experience of modernisation of law, especially the story about how the Japanese had established their civil code, drew Plod's admiration while he was in England. Plod was impressed by the methodology that the Japanese draftsmen used to draft the Minpō of 1898 and by the Japanese experience with the failed Minpō of 1890 drafted under the influence of French law, in which he saw parallels to the situation in Siam. According to Plod, while studying in England he was looked after by a close friend of Rabi, John Simon First Viscount Simon (1873-1954), who was a prominent British politician.²⁷ Plod spent his first eight months in England learning English. He then joined the Inner Temple spending two more years there before being called to the Bar in 1916. Plod told the interviewers that he had brought a copy of an early draft of the Code of 1923 which was prepared by the French draftsmen with him to England and showed it to Simon seeking his opinion on it.²⁸ The British politician told Plod that, despite their bold attempt, the Frenchmen had not been skilful enough in their drafting of a code of law. He suggested that the Thai should learn from the French failure and should not waste time on making an original code. Simon described Japan's experience with the drafting of the Civil Code which bore a similarity to Thailand's and further suggested that Thailand should adopt the Japanese method for drafting a code.²⁹ After qualifying as a barrister Plod spent nearly a year practising at the chambers of Simon's friend, Sir Hugh Fraser. There, he received similar advice on drafting a Thai code.³⁰

Plod admitted that his knowledge and the advice about the drafting of the Minpō of 1898 he received in England inspired his work on the drafting of the Code of 1925.³¹ When he returned to Thailand in 1917, Plod was briefly appointed as a judge before being transferred to the law department of the Royal Household as the deputy head in the same year. There he had the chance to serve Vajiravudh closely. The king complained about the inefficiency of the drafting of the civil and commercial code under the direction of the French and it had taken so much time

²⁷ *ibid* 40.

²⁸ *ibid* 41.

²⁹ *ibid* 41–42.

³⁰ *ibid* 41.

³¹ *ibid* 42.

and millions of baht, but no results had been presented to him.³² The king asked Plod to take on the task and get results. At that moment, Plod's solution 'was to copy Japanese law'.³³ [My translation]

Plod was appointed as secretary to the Codification Commission in 1919. His appointment was followed by three important events, the translation of the draft of the Code of 1923 and the promulgation of the Code of 1923, the establishment of the Department of Legislative Redaction in 1923, and the redrafting of the civil and commercial code in 1925. According to Plod, when the king appointed him to be the secretary to the Codification Commission in 1919, he had high expectations for him to complete the task of drafting the civil and commercial code speedily. Plod translated the draft of the Code of 1923 into Thai and submitted this to the king, who assigned a translation committee to examine it.³⁴ Plod recalled the events which took place between 1919 and 1925:

After I was appointed as the secretary of the Codification Commission [in 1919], I followed the example of the Japanese in translating the French draft and then circulating the translation among judges...I translated the French draft of [around] 200 articles and asked Thai judges to review the translation. But the judges could not accept it. This was so similar to the Japanese experience that their French draft was also rejected by their judges. Eventually, King Vajiravudh set up a committee consisting of mostly royal family members to examine my translation...At that time, it was risky to express my negative view on the French draft; it is not easy to make Thai people who generally strongly held a positive view of western products and ideas believe that the French draft was defective. I had to pretend to say that the draft was good and therefore needed to be translated into Thai. However, I privately told the king that it was a bad one and also referred to several other Thai law experts who held the same view...The High Revising Committee also read the translation and found it was unreadable, incoherent and incomprehensible. They asked me as to how to solve this problem. I suggested that we circulated copies of the translation among judges and lawyers to see how they responded to it. As expected, the French draft attracted heavy criticism from Thai judges and professional lawyers. The new drafting committee was therefore established.³⁵ [My translation]

It is certain that Plod meant the Committee of Legislation of the Department of Legislative Redaction, which replaced the Codification Commission. This

³² *ibid* 43. See also National Archive of Thailand, Miscellaneous Doc No Bor 9/115, 'หนังสือพระเจ้าบรมวงศ์เธอ กรมหลวงสวัสดิวัตนวิศิษฐ์ กราบบังคมทูลพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว (Letter from Prince Svastiwatvisit to King Vajiravudh)' (18 April 1916).

³³ Manavarajasevi, *Interviews* 43. The original text in the tape transcript is 'ท่านจึงรับสั่งให้ฉันไปทำว่า 'เอ็งไปทำมาทีละอะวะ ให้มันออกมาให้เห็นกันหน่อย' ตอนนั้นฉันรู้แล้วว่าควรจะถือปี่ญี่ปุ่น'.

³⁴ *ibid* 12.

³⁵ *ibid* 29–30.

reorganisation took place on 27 October 1923 while the French draft of the civil and commercial code was promulgated on 11 November 1923. This indicates that Plod's account of how the Japanese strategy was exploited to reject the French draft seems reliable. The Thai government chose to promulgate the law to satisfy the French but foresaw widespread criticism of the Code of 1923, which was expected to result in a demand for redrafting the law. This could then be used by the government as a legitimate excuse for rejecting the Code of 1923. However, it is unclear when Plod began to lobby Vajiravudh to set aside the French draft. It is reasonable to assume that this took place between 1922 and 1923 because there is evidence that the English draft of the Code and its Thai translation were completed in 1922 and the king appointed the High Revising Committee, which consisted of mostly royal ministers of the government, on 15 June 1922 to examine the drafts.³⁶ This is consistent with Plod's account above.

1.4 René Guyon

Guyon (1876-1963) was a Frenchman who eventually became a naturalised Thai citizen, acquired a Thai name as Pichan Boonyong, and lived in Thailand until the end of his life. Guyon, a doctor of law from the University of Paris, had spent some years working as a judge in France.³⁷ He was hired by the Siamese government to work as a judge at the Siamese Appeal Court in 1908 on the recommendation of Georges Padoux, the Legislative Advisor to the government and the chief draftsmen of the civil and commercial code between 1908 and 1916.³⁸ Guyon therefore served as a draftsman of the civil and commercial code from the beginning of the process and he was the only French draftsman who joined the drafting committees of both the Codes of 1923 and 1925. He assumed the role of chief draftsman during the major reform on the drafting committee in 1916, which saw the Thai draftsmen's first involvement in the process. Despite the participation of Lad, Chitr and Boonchoi and despite the shift from the French structure of the draft to the German

³⁶ National Archive of Thailand, Ministry of Justice Doc No Yor 12 1/4,

'พระราชหัตถเลขาพระบาทสมเด็จพระมงกุฎเกล้าเจ้าอยู่หัว โปรดเกล้าฯ แต่งตั้งกรรมการตรวจคำแปลร่างประมวลกฎหมายแพ่งและพาณิชย์ (King Vajiravudh's Decree on the Appointment of the High Revising Committee)' (15 June 1922).

³⁷ René Guyon, *พินายอนุสรณ์ (Pichan Anusorn)* (Prime Minister's Office 1963) ก-ค.

³⁸ National Archive of Thailand, Miscellaneous Document No Bor 9/115,

'หนังสือจากกรมหลวงเทวะวงศัวโรปกการ ถึงพระเจ้าลูกเธอกรมหมื่นประจักษ์ศิลปาคม (Letter from Prince Devavongse to Prince Prajin)' (28 August 1907); *ibid* ก.

one, the draft was still considerably influenced by French law,³⁹ and the French continued to dominate the drafting of the Code. It was not until Plod's appointment as secretary to the Codification Commission in 1919 that the dominance of French law and the French draftsmen began to decline.

Guyon's role in the drafting of the Code of 1925 remains unclear. Despite holding an advisory position in the Committee of Legislation, Guyon attended the drafting meetings sporadically and only in March,⁴⁰ September⁴¹ and October 1925.⁴² According to the minutes of the meetings of the Committee of Legislation (or the drafting committee), De Planterose and Cazeau attended meetings regularly and the latter in particular often participated in the discussions. Despite their active role, Plod on several occasions during the interviews mentioned only the name of Guyon as a member of the Committee of Legislation⁴³ while on one occasion he understated the role of De Planterose and Cazeau.⁴⁴ Plod's memory of Guyon's position in the Committee was inaccurate since Guyon was in fact the advisor to the Committee. The reason Plod recognised Guyon's contribution while ignoring the two Frenchmen's may be that Guyon actually played a more important role in the drafting process than de Planterose and Cazeau. Despite being the most influential foreign figure in the drafting of the code of 1925, in comparison with his previous role in the drafting work of the Code of 1923, Guyon was not instrumental in the drafting process of the Code of 1925.

There are two explanations for Guyon's limited role in the drafting of the new Code. First, among the persons who were appointed to the Committee of Legislation of the Department of Legislative Redaction, other than Abhai Raja, the President of the Committee and Minister of Justice, Guyon was the most senior draftsman and was the most recent chief draftsmen of the Code of 1923. However, it was not Guyon but Chitr who presided at the drafting meetings. Moreover, the Thai members of the Committee of Legislation outnumbered the French. This implies that the Thai Government expected the Thai draftsmen to lead the drafting process.

³⁹ See Kasemsup, 'Reception of Law in Thailand' 293; Phagagrang, 'Drafting of the Siamese Civil and Commercial Code' 89.

⁴⁰ Guyon attended the meetings of the Committee of Legislation on 3, 6, 10, 13, 17 and 24 March. 'Meeting Minutes' (3, 6, 10, 13, 17 and 24 March 1925).

⁴¹ Guyon attended the meetings of the Committee of Legislation on 25, 26 and 29 September. 'Meeting Minutes' (25, 26 and 29 September 1925).

⁴² Guyon attended the meetings of the Committee of Legislation on 12–17, 20–24 and 26 March. 'Meeting Minutes' (12–17, 20–24 and 26 March 1925).

⁴³ Manavarajasevi, *Interviews* 4, 7, 29–30, 32, 43–44, 48.

⁴⁴ *ibid* 38.

The second explanation is Guyon's disagreement over the revision of the Code of 1923 and the adoption of the German Civil Code as the principal model for the redrafting of the new civil and commercial code. In the first drafting meeting of the Committee of Legislation on 3 March 1925, in which the draftsmen discussed how to revise the Code of 1923, Guyon proposed that the draftsmen should only amend some of its articles. However, the majority of those at the meeting, namely Chitr, Boonchoi, Plod and Luang Sarasaas Prapan (Chuen Charuvatr), who attended the meeting as its recorder, insisted that all of books I and II must be revised.⁴⁵ Following his defeat at the first meeting of 3 March 1925, Guyon wrote to Abhai Raja, then Minister of Justice and President of the Committee of Legislation on 7 March 1925, discussing the Western powers' concern about the policy of the Siamese government for the publication of the drafts codes and therefore proposing a note which explained the position and the policy of the Department of Legislative Redaction in this matter. He reminded Abhai Raja about their prior verbal agreement on the position and policy of the Department.⁴⁶ Guyon's letter was clearly aimed at persuading the Minister of Justice to adopt his policy on the drafting of the Civil and Commercial Code, which was reflected in the note attached to the letter, as the official policy of the Department. This note, prepared by Guyon, shows his disapproval of the use of the BGB as the principal model for the Thai Civil and Commercial Code. He wrote:

They are far from contending that the German Code of 1900 is not a masterly piece of law. Everybody agrees that it was made very carefully and with a special scientific method. But the Department want to remind [you] that, from the beginning of the Codification in Siam, it was admitted, as a matter of policy, that **the German Code was not a suitable model for this country** [my emphasis]. The presentation of the German Code is so abstract, the system of connections between the different parts is so complicate[d], that, even in Germany, there have been many difficulties and contentions between German trained lawyers for the true meaning and construction of many provisions.⁴⁷

On the other hand, Guyon praised the French Civil Code as an ideal model. He wrote:

⁴⁵ 'Meeting Minutes' (3 March 1925) 1-3.

⁴⁶ National Archive of Thailand, Office of the Council of State Doc No 9, 'Letter No 75/131 from René Guyon to Chao Phraya Abhai Raja' (7 March 1925).

⁴⁷ *ibid*, 'Note of the Department of Legislative Drafting on the Publication of the Draft-Codes' 1.

When Switzerland – [a] country where a great deal of citizens are of German language – have made their Civil Code and Code of Obligations (from 1900 to 1912) they have refrained [from taking] the German Code as an exclusive model, and, being anxious before all to make a practical work, they have referred to both German and Latine precedences, taking the best in each of them. This has been the ideal also of the Commission of Codification in this country [Siam], and, if the draft[s]men have been frequently closer to the solutions of the Code Napoleon, that is only because each solution appeared to be the clearest. It seems that this has been also the impression of so many countries who have taken the Code Napoleon as a model (Begium, [the] Netherland[s], Italy, Spain, Portugal, Greece, the South American Republics, etc. etc.).⁴⁸

There is no evidence about how the Minister of Justice responded to Guyon's proposal. But at the meeting on 13 March 1925 Guyon again opposed Chitr's suggestion to arrange the new Civil and Commercial Code in accordance with the BGB's structure and advised the draftsmen to concentrate on the revision of some early provisions instead.⁴⁹ However, on 17 March, Guyon presented the meeting with a draft of the structure of Books I and II of the Code of 1925, which obviously followed the Pandectist system.⁵⁰ The minutes of the 17 March 1925 meeting did not record what happened prior to the meeting where Guyon changed his position. There were no drafting activities with regard to the new Code in April 1925. The drafting work resumed in May 1925 and the committee met regularly until the end of the process on 26 October 1925. Guyon attended the meeting until the end of March. He was absent between May and August but resumed his attendance in late September and attended almost every meeting in October. Even when absent, Guyon voiced his opinions via the French draftsmen⁵¹ and despite his irregular attendance, Guyon had a role in the drafting process behind the scenes. A complete draft was sent to him for his comments before it was officially submitted to the High Revising Committee. He, however, made only some small linguistic changes.⁵²

Guyon's subsequent involvement in the drafting process, especially his comments on the drafts of new Books I and II prepared by the draftsmen, shows no sign of his continuous strong opposition to the adoption of German law. In fact, they were mostly minor language corrections. The French draftsmen, particularly Cazeau, who attended the drafting meetings regularly, also did not show any reluctance to follow the method adopted by the Thai draftsmen and only occasionally proposed provisions in the French Civil Code as a model for the Thai

⁴⁸ *ibid* 2.

⁴⁹ 'Meeting Minutes' (13 March 1925) 5.

⁵⁰ *ibid* (17 March 1925) 3.

⁵¹ *ibid* (17 August 1925) 1; *ibid* (23 September 1925) 1.

⁵² *ibid* (17 August 1925) 1; *ibid* (12 October 1925) 1.

drafts. From these facts, it would, however, be mistaken to conclude that the Frenchmen eventually accepted that German law was superior to their own law. It is more convincing to conclude that they found that resistance to the new policy on codification was pointless. Another possible explanation is that the Thai government may have made it clear to them that the German and Japanese models were preferred.

2. METHODS AND MATERIALS FOR DRAFTING THE CODE OF 1925

When conducting research on how the Code of 1925 was drafted, there are two main types of available primary sources. The first type is the minutes of the meetings of the Committee of Legislation. These minutes show what the draftsmen of the Code of 1925 discussed. There is usually an English draft of the discussed provisions attached to each report. In the English drafts, there are often notes showing which foreign law provisions were used as models. The minutes show a brief and summarised discussion of the draftsmen in each meeting. The second type is a compilation of the English drafts of Books I and II of the 1925 Code ('the Book of the Revised Drafts'). The English drafts which are contained in this book are not merely copies of the original English drafts which were attached to the minutes of the meetings of the Committee of Legislation. They are in fact copies which were finalised by the draftsmen and later examined and corrected by the High Revising Committee. It is widely believed that the Book of the Revised Drafts was compiled on Plod's instructions⁵³ as he also claimed.⁵⁴

The way the Book of the Revised Drafts was compiled deserves careful attention and should be examined in greater detail as it provides a clue as to how the whole process of codification was carried out. The compilation contains the English and Thai drafts of Books I and II of the Code of 1925, but several parts of the drafts are interrupted by correspondences between the members of the Committee of Legislation and the High Revising Committee, mostly between Plod and Prince Paribatra, the President of the High Revising Committee. The contents of the drafts show several handwritten linguistic corrections most likely made either by the draftsmen in accordance with the High Revising Committee's recommendations or by the Committee themselves. In each provision in the English draft, there is a

⁵³ Manavarajasevi, *Instances and Sources* 1–64.

⁵⁴ Manavarajasevi, *Interviews* 6, 19, 50.

handwritten annotation which gives the sources on which the provisions were modelled.⁵⁵

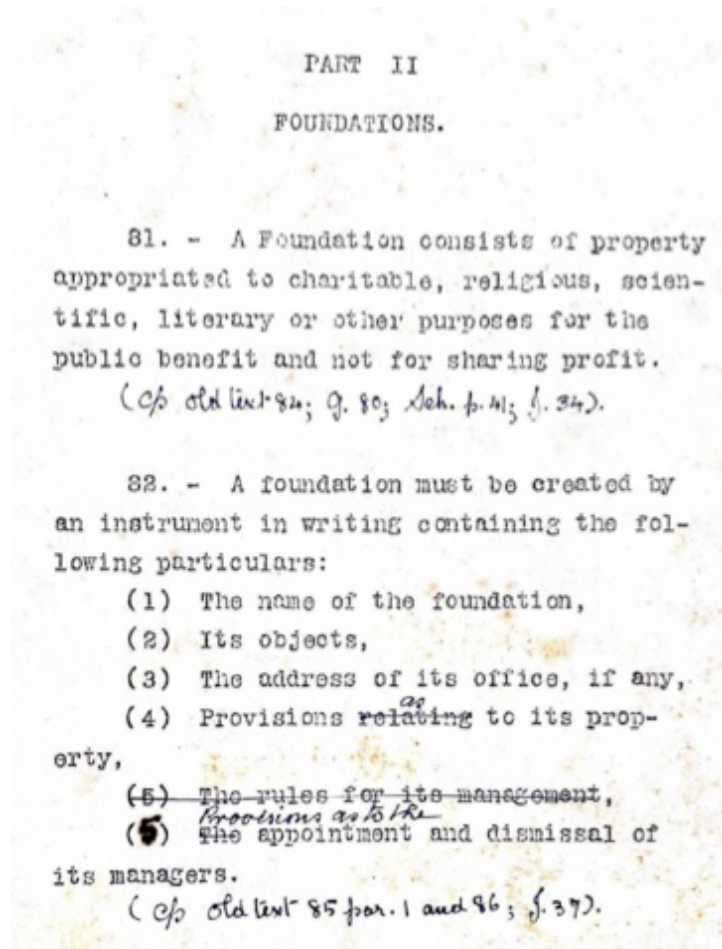


Figure 3 - 1: A sample of the English draft in the Book of the Revised Drafts. The page contains arts 81 and 82 with some corrections and annotations.⁵⁶

Although both types of primary sources provide valuable information on the drafting process of the Code of 1925, they do not give a full picture of how it was made, especially how foreign private law had been used to form the basis of each provision of the code, and why it replaced the Code of 1923. This insufficiency led to the series of interviews with Plod between September 1980 and June 1981 as discussed above. The interviewers paid more attention to the making of the Code of 1925 and Plod's answers clarified several important issues about, *inter alia*, the

⁵⁵ Office of the Council of State, Doc No 79, 'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925).

⁵⁶ *ibid* 47.

reason for repeal of the Code of 1923 and the shift from French law to German law, the methods and foreign materials which were used by the draftsmen to draft the Code of 1925. When studying the history of the codification of private law in Thailand one must consult Plod's interviews. However, in doing so, one must consider their limitations. First, Plod was ninety when he started to give the interviews, almost sixty years after the promulgation of the Code of 1925. Despite his old age, he was physically and mentally in good health.⁵⁷ His memory, though generally good, was not entirely accurate. For example, he told the interviewers that Guyon was the only French member of the drafting committee of the Code of 1925⁵⁸ although later he mentioned the names of the other two French draftsmen.⁵⁹ Second, Plod only gave a general account of the making of the Codes of 1923 and 1925 and did not provide details about how specific legal principles were established.

To find out how the Code of 1925 was established, the two primary sources and the transcripts of the tapes of the three interviews with Plod, published by Thammasat University, have been consulted. The reliability of Plod's information especially on the methods and foreign materials used in the drafting of the code, which was given in the interviews will be examined below. It is notable that the English draft of the Code of 1925 was never recognised in Thailand either as a source of law or as its official English translation despite the fact that the first draft of the code was made in English. The Code of 1925 is in fact only officially available in Thai.

2.1 Drafting the Code of 1925

In the interviews, Plod revealed the method which the Thai draftsmen employed when drafting the Code of 1925. This general method is the main focus of this thesis since it illustrates how foreign law was received and helps to confirm the thesis's main hypotheses about Alan Watson's theory of legal transplants, namely whether the reception of foreign private law in Thai law is, in Watson's terms, a legal transplant and whether the 'a systematic knowledge of the law' was not necessary for the success of the legal transplant in Thailand. This research not only focuses on the method for the drafting of the Code of 1925 but also on why the Thai draftsmen

⁵⁷ Email from Kittisak Prokati to author (26 April 2013).

⁵⁸ Manavarajasevi, *Interviews* 29–30, 32, 44.

⁵⁹ *ibid* 38.

adopted this method. This will help us fully understand legal borrowing in Thailand.

2.1.1 The Japanese method

In all three interviews, Plod often mentioned ‘copying method’ or ‘Japanese method’: he used these terms interchangeably. According to Plod in the first interview, his translation of the French draft of the Thai Civil and Commercial Code of 1923, as he envisaged, attracted heavy criticism from the High Revising Committee, who summoned him and his brother, Chitr, for consultation. The Committee posed a question about improving the situation. While his brother was deliberately silent on the matter, Plod enthusiastically offered a solution.⁶⁰ He proposed that

We use the method that the Japanese did - that is ‘to copy’ - in drafting their Civil Code...we therefore simply copied Japanese law. This is a simple and quick way [to complete a draft]. Even the French drafters were not skilful enough at drafting a good Civil Code. We, Thais, with relatively limited skills and experience, would do it even worse. To adopt the Japanese method is efficient because the Japanese copied from the German Civil Code, which was a product of hundred of years of development. The Japanese carefully chose comprehensible German legal principles which were suitable for them but ignored complicated ones.⁶¹ [My translation]

In the third interview, Plod revealed that using the Japanese method had been in his mind since he was a law student in England. When Vajiravudh asked him to get the task of drafting the Civil and Commercial Code done quickly, Plod already had an idea about how to carry out the task. He recalled that

At that moment, I had already had a solution, which was to copy Japanese law. The copying is easy. I just took the contents of Books I, II, and III [of the foreign Codes], to form the basis of Books I and II of the Thai Civil and Commercial Code and then translated them into Thai language.⁶² [My translation]

In the second interview, Plod claimed that following widespread criticism of the Code of 1923, Vajiravudh preferred the new code to be made within the German Pandectist framework. It is not clear whether the King’s preference for German law

⁶⁰ *ibid* 4.

⁶¹ *ibid*.

⁶² *ibid* 43.

was widely known among the people involved in the drafting process or was revealed in a private conversation with Plod. Plod claimed that the other draftsmen accepted his proposal to adopt the Japanese method. He recalled that

Since the king preferred the new code to be modelled on the Pandectist system and drafted in accordance with the Germanic system, I proposed that we follow the Japanese model. Once we reached an agreement, we four draftsmen began to translate. We then drafted the Code both in English and Thai.⁶³ [My translation]

Interviewed by officials of the Council of State of Thailand (formerly Department of Legislative Redaction) on 30 October 1981, Plod admitted that he drafted the Code of 1925 ‘mostly by copying the Japanese Civil Code’ [my translation] and the draftsmen’s claim that the Thai code was a product of ‘comparative system’ was exaggerated.⁶⁴

Having examined the minutes of the meetings of the Committee of Legislation, especially on 3 March 1925, which was the first meeting for the revision of the Code of 1923, it was found that Plod’s account is authentic. In that meeting, there was a debate about how to revise the Code of 1923. Guyon, who had anticipated that the Thai draftsmen were preparing to make major changes to the Code of 1923, suggested that the draftsmen should only revise some provisions and expressed the idea that revising the whole code was not appropriate because the Code of 1923 had just come into effect.⁶⁵ However, Chitr proposed revising the entire code. Responding to Guyon’s opposition, he referred to Vajiravudh’s wish for the whole of Books I and II to be revised.⁶⁶ In support of his brother’s proposal, Plod claimed that the High Revising Committee, whose members were mostly cabinet ministers and members of the royal family, had already agreed that the Code of 1923 could be revised as much as necessary. In Plod’s opinion, it was more appropriate to consider the law article by article.⁶⁷ The meeting resolved the disagreement with a vote: the majority were in favour of Plod’s proposal that the draftsmen considered revising every provision of the Code of 1923.⁶⁸ The defeat at this meeting prompted Guyon to write the letter to Minister of Justice to reconsider the policy on the adoption of the BGB as a model.⁶⁹

⁶³ *ibid* 45–46.

⁶⁴ Manavarajasevi, ‘Recollection of Phraya Manavarajasevi’ 5.

⁶⁵ ‘Meeting Minutes’ (3 March 1925) 1–2.

⁶⁶ *ibid* 3.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

⁶⁹ pp 99–100 above.

After the meeting on 24 March 1925, the drafting resumed on 25 May 1925. The draftsmen agreed to adopt the Minpō of 1898 as a template for structuring the drafts of the revised provisions. At the end of the meeting, the draftsmen only obtained a rough, incomplete and disorganised draft of the first set of provisions for the new code. The meeting then assigned Plod the task of improving the draft in accordance with the Minpō of 1898. The minutes of the meeting state:

The meeting thought that the revising of the provisions, which has been done so far, was not thorough and that they needed to be restructured in accordance with the Japanese Civil Code. The meeting agreed to assign Phraya Manavarajasevi [Plod] to carry out this task whose result was to be submitted to the next meeting.⁷⁰ [My translation]

The minutes of the meeting of the draftsmen and Guyon's letter to Minister of Justice on 7 March 1925 prove that there was a shift in policy from adopting French law to adopting German law. The continuous use of the German and Japanese Civil Codes as the principal models despite Guyon's opposition implies that the change of policy was backed or approved by Vajiravudh and cabinet ministers as Plod claimed. Moreover, the adoption of the Minpō while the new policy was to use the BGB means that the Thai draftsmen understood that the Japanese Code was closely related to the German Code and this verifies Plod's claim that he had proposed that the Thai government adopt German instead of French law and that the example of the Japanese redrafting the civil code should be followed.⁷¹ We may thus construct a narrative about how the Japanese method became the principal method for making the Code of 1925. The work of codification in Thailand between 1908 and 1925 was mainly influenced by French law, but the Thai government switched the policy to adopt German law following Plod's recommendation. The Thai draftsmen adopted the Japanese method and Japanese law alongside German law because they inclined towards Plod's belief that Japanese law was a modified version of German law.⁷² But was the Japanese Civil Code simply a reflection of German law as Plod thought? This will be answered by historical and comparative research of German and Japanese law in the next two chapters respectively.

In summary, Plod introduced the Japanese method to the drafting of the Code of 1925 in the belief that this method was to 'to copy' legal texts⁷³ and that the Minpō of 1898 was a reflection of the BGB. This seems to be a case of what, in

⁷⁰ 'Meeting Minutes' (25 May 1925) 11.

⁷¹ Manavarajasevi, *Interviews* 4, 30, 43–44.

⁷² *ibid* 13.

⁷³ *ibid* 4.

Watson's terms, is known as a 'legal borrowing' or 'legal transplants' in the making of the Code of 1925. To be certain, we need to examine how the Thai draftsmen actually employed the so-called Japanese method. This will be done later in this chapter. First, we need to answer an important question as to why the Japanese method was chosen.

2.1.2 Explanations for adopting the Japanese method

There are a number of explanations for why the draftsmen generally used the Japanese method or the copying method in drafting the Code of 1925.

The primary explanation is Plod's powers of persuasion. Plod introduced the copying method to the drafting of the Civil and Commercial Code and this led to its successful promulgation. Although there is no conclusive proof of his dominant role, significant progress had been made in the drafting process since 1919 in which he was appointed as the secretary to the Codification Commission. Although, unlike Chitr and Boonchoi, Plod did not take part in preparing the English draft of the Code of 1923 between 1919 and 1921 he had been assigned a task of translating it into Thai.⁷⁴ The Thai draft of the Code of 1923 prepared by Plod became law in November 1923 and drew severe criticism from Thai judges and lawyers. Plod successfully persuaded the king and senior members of the royal family who held seats in the cabinet and his draftsmen colleagues to adopt the Japanese model. This resulted in the dramatic shift in policy on codification in early 1925 that the new Civil and Commercial Code was drafted principally based on the BGB and by means of copying. Plod claimed that the issue of adopting the Japanese model had never been raised and that foreign advisers to the government, including Tokichi Masao, a Japanese advisor, and Gustave Rolin-Jaequemyns, had never discussed the Japanese experience in making the civil code.⁷⁵

The second explanation is the similarity between Japan's and Thailand's experiences with the drafting of the civil codes and Thailand's admiration for Japan's success in simplifying the BGB. Plod's persuasion alone may not have been the decisive factor in following the Japanese model. The experience and success the Japanese had in modernising their law were intrinsically attractive to Thai policy makers. Moreover, the Japanese system had emerged as a preferred model for the modernisation of Siam. Japan not only exerted influence in the making of modern

⁷⁴ *ibid* 28–29

⁷⁵ *ibid* 21.

Thai civil law, but it also provided precious lessons for a Thailand wanting to escape from colonisation from the start of its modernisation process.⁷⁶

The third reason is the failure of the French draftsmen to create a viable code. As we saw above, the drafting work of the Civil and Commercial Code in Thailand was controlled by French draftsmen from 1908 to 1923. The product of this prolonged work was the abortive Code of 1923. In 1919, Guyon, as the chief of the drafting committee of the Siamese codes of law, published a report in the name of the Siamese Ministry of Justice outlining an historical account of the work of codification in Siam and showing progress in codification.⁷⁷ Guyon revealed the methodology for making the Code of 1923 saying

The aim of the members of the Commission has been above all to accomplish a work which would prove consistent with the requirements of the country. Consequently, they have, with the greatest care, avoided indulging in the too easy plan of copying any foreign Code, perfect as it might be, and of transferring their provisions, with slight alterations, into the Siamese legislation. They have, for each Draft, pursued the same method: first, they have made a general study of the matter as it stands in the existing Siamese texts (laws or judgments) and in the principal foreign Codes. They have frequently referred to such valuable guides as the French Code, with its traditional lucidity, the English law with which the Siamese lawyers are often better conversant, the practical and modern rules of the Swiss and Japanese Codes, the technical precisions of the German Codes, the improvements which recently have often been made in the legislations of Italy, Belgium, the Netherlands, America, etc. They have always given preference to the most practical solution, and to the best adapted to modern requirement. They have, therefore, tried, without being sheer imitators, to benefit from the experience and wisdom of their predecessors. References, to the above mentioned works have enabled the members of the Revising Committees easily to look for precedents when examining the Drafts.⁷⁸

Guyon's attempt to produce an original work by reconciling traditional Thai law and several foreign legal systems and by avoiding blindly copying from them failed since the Code of 1923 which he and his fellow draftsmen produced was heavily criticised. Plod viewed the Code of 1923 as 'an incoherent and muddled code which neither represented good French legal principles nor could be regarded as a follower of the German or Swiss Civil Codes'⁷⁹ [my translation]. For Plod, this

⁷⁶ Tips, *Gustave Rolin-Jaequemyns* 240; Yoneo Ishii and Toshiharu Yoshigawa, *ความสัมพันธ์ไทย-ญี่ปุ่น 600 ปี (600 Years of Thai-Japanese Relations)* (Charnvit Kasetsiri and Saichon Wannarat trs, Foundations for the Promotion of the Social and Humanities Textbooks 1987) 93–94.

⁷⁷ Guyon, *Work of Codification* 3.

⁷⁸ *ibid* 11.

⁷⁹ Manavarajasevi, 'Recollection of Phraya Manavarajasevi' 4.

failure proved the impracticability of the method used by the Frenchmen and therefore a simpler way to draft a code was preferred.⁸⁰

The fourth possible explanation is that the Thai draftsmen believed that the copying method would accelerate their work. The draftsmen carried out their work under the pressure of two time frames. First they had to establish a civil and commercial code quickly so that the Thai government could relax or end extraterritoriality.⁸¹ Plod revealed that Siam was desperate to regain full judicial autonomy without delay and that the copying method effectively expedited the drafting process.⁸² Their work was also dictated by the time frame for the implementation of the Code of 1923. The Code containing Books I and II was promulgated on 11 November 1923, but as a result of Plod's recommendation its enforcement was postponed until 1 January 1925. After promulgation, copies of the Code of 1923 were circulated among judges and professional lawyers for feedback. The draftsmen first met to discuss the revision of the Code of 1923 on 3 March 1925 and they completed the draft of the Code of 1925 on 26 October 1925, which was later than the date set for the enforcement of the Code of 1923. However, according to Plod, the Code of 1923 was never used in practice.⁸³ When the interviewers asked him how the draftsmen finished the drafting task in less than two years, Plod answered that the drafting of the Code of 1925 was easily done by means of copying of the Minpō.⁸⁴ Time pressure is also well illustrated in a letter from Prince Paribatra, the President of the High Revising Committee, to Plod of 19 July 1925 expressing concern about the time frame for the enforcement of the new Civil and Commercial Code. In this letter, Paribatra suggested that in addition to the English draft of some first articles of new Book I he had expected to receive its Thai translation from the draftsmen but that in order to save time he and his fellow committee members agreed to translate the draft into Thai themselves.⁸⁵ For consistent translation, the High Revising Committee translated the English drafts of all of Book I while in examining of Book II it was provided with both English and Thai versions of the drafts.⁸⁶

⁸⁰ Manavarajasevi, *Interviews* 4.

⁸¹ See the examples discussed in ch 2, 2.1 'External pressure' 61.

⁸² Manavarajasevi, 'Recollection of Phraya Manavarajasevi' 5.

⁸³ Manavarajasevi, *Interviews* 7.

⁸⁴ *ibid* 45-46.

⁸⁵ Letter from Prince Paribatra to Phraya Manavarajasevi (19 July 1925) in 'Book of the Revised Drafts', 38.

⁸⁶ Letter from Phraya Manavarajasevi to Prince Paribatra (8 September 1925) in *ibid* 102; Letter from Prince Paribatra to Phraya Manavarajasevi (9 September 1925) in *ibid* 125.

The last plausible explanation for the adoption of the copying method is that it offered an effective defence of the new Code. As discussed above, extraterritoriality was a great motivation for completing the work of codification quickly. However, colonial powers continued to interfere with Thai government affairs. Their interference did not allow the draftsmen to work on their task in freedom. Great Britain and France, in particular, competed to dominate the work of codification in Siam. The latter seemed to be more successful in influencing the Siamese government's policy on law reforms mostly by means of offers to relax the consular jurisdiction clause in the treaty in exchange for French appointments in legislative bodies;⁸⁷ a number of Frenchmen had taken part in the drafting of the Penal Code of 1908, where Padoux held the position of the chief draftsman and the civil and commercial codes, where the Frenchmen almost completely dominated the drafting committees from the beginning. The dominance of the French in the drafting of the civil and commercial code displeased the British as illustrated in the letter from the British Ambassador, Robert Greg, to Minister of Foreign Affairs, Prince Tridos, dated 5 December 1923. Greg wrote:

As the Code Committee, where not Siamese, is French, I think it more than probable that the new Code will have at least something of a Gallic turn. In this connection Your Highness will not forget the Annex to the 1909 Treaty about Siamese and English law in which it is laid down that, where no Siamese Statute or precedent exists, the Siamese Courts will be guided by English Statutes and cases as far as circumstances permit, especially in commercial matters. The introduction therefore of a new Commercial Code, drawn up presumably on a Latin basis, will probably prove something of a hardship to our merchants, reared and nurtured on Anglo-Saxon Common Law which, as I reminded the late Prince, is peculiar to the United States of America as well as to Great Britain.⁸⁸

Drafting a civil and commercial code satisfactory to all the major powers was a formidable task. An original code would be more vulnerable to criticism. For Plod, the adoption of the copying method and adherence to the Japanese example seemed to be the safest option at least on the grounds that it offered protection from conceptual challenges. Plod told the interviewers that:

Following completion of the drafting of [the Code of 1925] but before promulgation, the British Embassy remonstrated fiercely with the Siamese government. Despite being an ex-student of the English law school myself, I was outraged by their action. They tried to block promulgation and

⁸⁷ See Foran, 'Amendment of Extraterritoriality Clauses' 150–70.

⁸⁸ National Archive of Thailand, Office of the Council of State Doc No 9, 'Letter No 162/14272 from Robert Greg to Prince Tridos' (5 December 1923).

criticised several provisions as conceptually incorrect... That is why we must have defended our work from their criticism. I told them that the provisions they challenged were not the products of my wisdom but the products of the copying. My argument could silence them. At the time, Great Britain had already protested the draft of the new code. The French protest was imminent. I told them that if the new provisions were not workable then our model laws, namely German law and Japanese law, would not be workable too... The British wanted us to adopt the common law system fully. I told them that it was not possible because that mission would take ages to complete. We better adopted codification because we could write something down and copy from others, which was not too difficult for us.⁸⁹ [My translation]

2.2 Materials

Legal materials are vitally important for legal borrowing not only because they are sources of legal knowledge, but they are also the object of borrowing and more specifically the object of copying. This is exemplified by the use of legal materials in the making of the Code of 1925 where the draftsmen consulted a number of English publications of foreign law not only as a source of knowledge but also as linguistic models for the provisions of the Code. Plod repeatedly affirmed that the Code of 1925 was principally copied. To assess whether they focused on the principles behind the model rules or uncritically copied the wording of the printed rules, the materials the draftsmen consulted for the drafting of Code of 1925 need to be considered. The use of legal materials is crucial to legal borrowing and may affect the success of legal borrowing in Thailand, which is to be discussed in subsequent chapters.

In the English draft of the Code of 1925, each provision contained a reference note which shows which foreign provisions were used as the models.⁹⁰ In the Book of the Revised Drafts, there is a list of abbreviations for foreign statutes and legal sources which were used in the references attached to each English draft of the Code of 1925 provisions:

⁸⁹ Manavarajasevi, *Interviews* 30.

⁹⁰ See eg Figure 3-1, p 102 above.

A.	Australian Civil Code
Arg.	Argentine Civil Code
Arg. Com.	Argentine Commercial Code
B. of Ex. Act.	Bill of Exchange Act 1882 45 & 46 Vict. C. 16
Becker Com.	The Principles and Practice of the Civil Code of Japan by J. E. De Becker
Brazil. (Er.)	Civil Code of Brazil
Brazil Com.	Commercial Code of Brazil
Fr.	French Civil Code
F.C.P.	French Civil Code of Procedure
F. C. P.	French Commercial Code
G.	German Civil Code
G. C. P.	German Code of Civil Procedure
G. Com.	German Commercial Code
It.	Italian Civil Code
It. Com.	Italian Commercial Code
J.	Japanese Civil Code
J. Com.	Japanese Commercial Code
Jenk's	Jenk's Digest of English Civil Law
Old text.	The Siamese Text of B.E. 2466 (1923)
Plan.	Traité [é]lémentaire de [d]roit [c]ivil
Sch.	The Principles of German Civil Law by J. E. Schuster
S. C. (S.)	Swiss Civil Code
S. O.	Swiss Code of Obligations
Section.	Section in the text of revision
C/P	Compare
Baud.	Traité théorique et pratique de droit civil par G. Baudry-Lacantinerie
Huebner	The History of Germanic Private Law by Rudolph Huebner ⁹¹

Since the German and Japanese Civil Codes were adopted as the principal models for the drafting of the Code of 1925, the focus of this research is therefore on the

⁹¹ 'Book of the Revised Drafts', 13.

publications which relate to these two legal systems and which were consulted by the draftsmen. This is also consistent with Plod's interviews in which he mentioned only books which were associated with German and Japanese law.⁹²

The publications on German and Japanese law used by the draftsmen were codes of law, namely the German Civil Code, the German Code of Civil Procedure, the German Commercial Code, the Japanese Civil Code and the Japanese Commercial Code and commentaries on the German and Japanese Civil Codes, namely *The Principles of German Civil Law* by Ernst Schuster and *The Principles and Practice of the Civil Code of Japan* and the first and second volumes of *Annotated Civil Code of Japan* by De Becker all of which were published in English. Rudolph Huebner's *The History of Germanic Private Law*, which deals with the history of German private law was also consulted.⁹³ It is not clear which English translations of the German Code of Civil Procedure, the German Commercial Code and the Japanese Commercial Code were used by the Thai draftsmen as the minutes of the drafting committee meetings and Plod's interview accounts did not provide clues about them. It is, however, certain that the draftsmen used Chung Hui Wang's *The German Civil Code: Translated and Annotated* published in 1907 and De Becker's *Annotated Civil Code of Japan* Volumes I and II published in 1909 as the main English translations of the German and Japanese Civil Codes.⁹⁴

Plod's interviews reveal interesting facts about the use of Wang's and De Becker's books. Plod said that the copying method was employed mainly with the help of these two books.⁹⁵ Their significance extended beyond the mere principal sources of knowledge of German and Japanese civil law. The minutes of some of the draftsmen's meetings show that some parts of the books were even used to construct a number of provisions of the Code of 1925. For example, in drafting Article 8 concerning the definition of force majeure, the draftsmen excerpted the summary of a Japanese Supreme Court's decision from De Becker's *The Principles and Practice of the Civil Code of Japan*, which the draftsmen thought explained the concept well.⁹⁶ Similarly, in drafting Article 210 concerning the creditor's default in the case of reciprocal obligations, the draftsmen initially agreed that Schuster's commentary on Article 298 of the BGB was more articulate than Wang's translation

⁹² Manavarajasevi, *Interviews* 8–9.

⁹³ 'Book of the Revised Drafts', 13; 'Meeting Minutes' (24 July 1925) 3.

⁹⁴ Manavarajasevi, *Interviews* 8–9; 'Meeting Minutes' (1 June 1925) 2. See Table 6-3, pp 179–81.

⁹⁵ Manavarajasevi, *ibid* 9.

⁹⁶ 'Meeting Minutes' (13 March 1925) 3. See also JE de Becker, *The Principles and Practice of the Civil Code of Japan: A Complete Theoretical and Practical Exposition of the Motifs of the Japanese Civil Code* (Butterworth 1921) 210.

in *The German Civil Code: Translated and Annotated* and therefore copied the wordings from Schuster.⁹⁷ However, on 28 August 1925, after reviewing the draft of this provision, the drafting committee found that the phrase ‘the required counter-performance’ was missing from Schuster and consequently overturned its original decision and decided to copy from Wang’s translation of Section 298 of the BGB instead.⁹⁸ The Book of the Revised Drafts consistently shows wording of Article 210 of the Code of 1925 is an imitation of Wang’s work.⁹⁹

	Texts of the models	Texts of the drafts
Original draft of Article 210 (attached to the minutes of the meeting of 22 August 1925)	In case of reciprocal obligations the creditor is in <i>mora</i> if he is willing to accept the other party’s performance, but fails to tender performance on his part. ¹⁰⁰ (Schuster)	In case of reciprocal obligations the creditor is in default if he is willing to accept the other party’s performance, but fails to tender performance on his part. ¹⁰¹ (Original draft of Article 210)
Revised draft of Article 210 (contained in the Book of the Revised Drafts)	If the debtor is bound to perform his part only upon counter-performance by the creditor, the creditor is in default if, though prepared to accept the performance tendered, he does not offer the required counter-performance. ¹⁰² (Wang)	If the debtor is bound to perform his part only upon counter-performance by the creditor, the creditor is in default if, though prepared to accept the performance tendered, he does not offer the required counter-performance. ¹⁰³ (Revised draft of Article 210)

Table 3 - 1: Comparisons between the texts of the original and revised drafts of Article 210 and their models

⁹⁷ ‘Meeting Minutes’ (22 August 1925) 2-3. See also Chung Hui Wang, *The German Civil Code: Translated and Annotated* (Stevens and Sons 1907) 161; Ernest J Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 161.

⁹⁸ ‘Meeting Minutes’ (28 August 1925) 3.

⁹⁹ ‘Book of the Revised Drafts’, 108.

¹⁰⁰ Schuster, *Principles* 161.

¹⁰¹ ‘Meeting Minutes’ (22 August 1925) 6.

¹⁰² Wang, *German Civil Code* 67.

¹⁰³ ‘Book of the Revised Drafts’, 108.

Among the publications on the BGB and Minpō of 1898, De Becker's works, especially *Annotated Civil Code of Japan*, deserve careful scrutiny. There are two reasons for this. First, the Thai draftsmen relied heavily on De Becker's books for understanding Japanese civil law and copying the English translation of Minpō provisions. Plod confirmed the importance of *Annotated Civil Code of Japan*:

In employing the copying method, we looked at two publications of the Japanese code...De Becker's books were very helpful in this.¹⁰⁴ [My translation]

Although Plod did not name the books of De Becker which were used by the Thai draftsmen, there is no doubt that the two publications of the Japanese Code Plod meant are Volumes I and II of De Becker's *Annotated Civil Code of Japan*.

Second, De Becker's commentary on the Minpō of 1898 was a product of the complicated reception of foreign law in Japan. This will be thoroughly discussed in Chapter 5 below.¹⁰⁵ De Becker, an English-born lawyer, who resided in Japan from the late 1880s, produced various works on Japanese law.¹⁰⁶ His series of *Annotated Civil Code of Japan* of 1909, consisting of four volumes, and *The Principles and Practice of the Civil Code of Japan* of 1921 have been particularly regarded as key to the English-speaking world's understanding of Japanese civil law.¹⁰⁷ De Becker's *Annotated Civil Code of Japan* is significant because it was one of the earliest translations into English. This work offers extensive commentaries on each Japanese provision which includes references to foreign provisions. De Becker did not reveal the purpose of having these references attached to the translation of each Japanese provision. For example, on Article 415, he wrote:

When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (in forma specifica), the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor.

(In reference vide Art. 414; also Arts. 250, 286 and 325 of the German Civil Code)¹⁰⁸ [My emphasis]

¹⁰⁴ Manavarajasevi, *Interviews* 9.

¹⁰⁵ See 1.2.3 'The tracing of De Becker's *Annotated Civil Code of Japan* and examining of Plod's perception of the reception of German law in Japan' 159 below.

¹⁰⁶ JE de Becker, *Annotated Civil Code of Japan*, vol 1 (Butterworth 1909) I.

¹⁰⁷ Richard W Rabinowitz, 'Materials on Japanese Law in Western Languages' (1955) 4 AJCL 97, 99; John O Haley, 'The Revival of German Scholarship on Japanese Law' (1982) 30 AJCL 335, 335.

¹⁰⁸ JE de Becker, *Annotated Civil Code of Japan*, vol 2 (Butterworth 1909) 25.

This referencing has potentially made the reader believe that the provisions to which were referred were the models of the Japanese provision in question. It seems that Plod was led into believing so. Plod referred to De Becker's *Annotated Civil Code of Japan* and remarked that

The Japanese did not conceal the sources; they expressly told us where each provision came from.¹⁰⁹ [My translation]

On another occasion, he said:

About how Hozumi adopted the BGB, he simply copied it. When the Japanese drafted their Civil Code, they had the list of references included in the draft.¹¹⁰ [My translation]

This method of referencing most likely inspired Plod to do the same thing – that is to write down the foreign sources of each Thai provision.¹¹¹ The question is whether the Japanese draftsmen really did reveal the source of law and statutes that they consulted.

More interestingly, for almost all of the Minpō provisions, De Becker only refers to the BGB or cross-refers to provisions of other Japanese statutes. Contrary to De Becker's adherence to German law and Plod's remark above, Nobushige Hozumi (1856-1926), one of the draftsmen of the Minpō of 1898, pointed out that the Code was modelled not only on the BGB but also on many other systems of law, including the French *Code civil*, English common law, the Swiss Federal Code of Obligations, the Spanish Civil Code, the Property Code of Montenegro, the Indian Succession and Contract Acts and the Civil Code of Louisiana.¹¹² This throws doubt on Plod's conception of the reception of German law in Japan – that is whether German law was the only foreign source of the Minpō provisions as showed in De Becker's *Annotated Civil Code of Japan*. Because of the concentration of German law in De Becker's books, one may suspect that in relying on them Plod was led into believing that the Minpō of 1898 was a copy of the BGB. A historical inquiry of these questions is crucial to our understanding of legal borrowing in Thailand and therefore will be made in the next two chapters.

¹⁰⁹ Manavarajasevi, *Interviews* 9.

¹¹⁰ Manavarajasevi, *Interviews* 23.

¹¹¹ See eg Figure 3-1, p 102 above.

¹¹² Nobushige Hozumi, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Tokyo Printing 1904) 11.

2.3 An overview of the drafting process

The discussions of the methods and materials used in the drafting of the Code of 1925 give us a rough idea of how foreign law was borrowed, but to have a full picture of legal borrowing in Thailand one needs to see the drafting process holistically.

In the drafting of Books I and II of the Code of 1925, there were two main organisations involved, namely the Committee of Legislation of the Department of Legislative Redaction (the drafting committee) and the High Revising Committee, an independent, ad hoc government body. The former consisted of legal experts as discussed above while members of the latter were princes and nobles most of who were cabinet ministers or head of departments without legal backgrounds. The work of codification was therefore concentrated in the drafting committee while the revisers focused on linguistic revisions and translations. Most of the existing evidence concerning codification shows how the draftsmen worked, but only some of it provides clues about how the revisers carried out their task. Unfortunately, there are no records for the meetings of High Revising Committee.

The meetings of the drafting committee were often attended by three Thai members, Chitr, Boonchoi and Plod, and two French members, De Planterose and Cazeau as well as a few Thai assistants, for example Laung Sarasasraphan. Chitr always presided over the meetings and Plod in addition to participating as a member took care of administrative work and acted as the coordinator between the drafting committee and the High Revising Committee.¹¹³ The draftsmen began work on the new Books I and II on 3 March 1925. At the first meeting, they discussed the framework for the drafting of the Code of 1925 and, after long debate, decided to review the Code of 1923 article by article. The draftsmen did not meet in April. The drafting work resumed in May and continued until 26 October,¹¹⁴ in which the last draft of Book II was completed. According to the minutes of the meetings, the draftsmen principally relied on two foreign codes – the BGB and the Minpō of 1898. They used the English drafts of Books I and II of the old Code of 1923 as the basis

¹¹³ 'Meeting Minutes' (25 May 1925). Plod often contacted the High Revising Committee on behalf of the drafting committee. See Book of the Revised Drafts. He also instructed Department of Legislative Redaction officials to compile and index the documents relevant to the work of codification. See Plod, *Interviews* 19, 50.

¹¹⁴ The draftsmen met twelve times in March, twice in May, thirteen times in June, seventeen times in July, twenty-four times in August, twenty-six times in September and twenty times in October 1925. See the minutes of the draftsmen between 3 March 1925 and 26 October 1925.

for Books I and II of the Code of 1925 and examined them article by article.¹¹⁵ They compared the drafts of the former Thai Code with the English translations of the BGB and Minpō, written by Wang and De Becker respectively. Most of the Code of 1925 rules were newly imported from the BGB and Minpō. Swiss law appeared to be another popular foreign model after German and Japanese law while some other foreign laws, such as the Civil Code of Brazil, were also taken into account but minimally.¹¹⁶ The old articles which were consistent with the German and Japanese Codes were preserved (although revised) while those that were inconsistent were removed. Some provisions, which were products of French jurisprudence, were kept when they were consistent with the German and Japanese rules, but the Thai draftsmen, who were critical of the French Code, avoided adopting any new French rules. Some old articles which originated from Swiss law were also spared but all amended, for example Article 4 concerning juristic methods, which was copied from Article 1 of the Swiss Civil Code.¹¹⁷ At the end of the meeting on 25 May, the draftsmen obtained a draft of a number of first provisions for the new Code which was in total disarray. As a result, the meeting tasked Plod with reorganising the draft in accordance with the Minpō of 1898.¹¹⁸ It can be concluded that none of the articles of the Code of 1923 were retained in their original form; they were removed, combined, altered or moved to other parts of the Code in accordance with the structures and contents of the German and Japanese Civil Codes.

The nature of the discussions in the meetings of the Committee of Legislation also deserves careful consideration. Although they appear to be summarised and therefore do not record full details of the discussions, the minutes of the meeting present a general picture of what the draftsmen had discussed and what they did. It is unfair to conclude that the draftsmen neglected to pay attention to the principles behind the rules. However, the way they looked into the principle behind a rule on which a Thai provision was modelled casts doubts on their methodology. The meeting reports suggest that, when examining whether the provisions of the Code of 1923 were consistent with the German and Japanese Codes, the draftsmen concentrated their attention on linguistics rather than other aspects of the rules. They did not discuss, for example, the sources of the Japanese model's rules or how they had developed. They were often satisfied with the Thai rules provided that their wordings were in line with those of Japanese and German provisions. When it

¹¹⁵ 'Meeting Minutes' (3 March 1925) 3.

¹¹⁶ Manavarajasevi, *Interviews* 4.

¹¹⁷ *ibid* (6 March 1925) 7-10; *ibid* (13 March 1925) 1-3.

¹¹⁸ 'Meeting Minutes' (25 May 1925) 11.

came to a choice between German and Japanese provisions, whichever was linguistically superior prevailed; the draftsmen chose the clearer and more concise one. For example, at the meeting on 18 August they considered Article 401 of the Minpō, which concerns the situations where the subject of obligation is indicated by its kind (species) only. Plod proposed that because the wordings of the Japanese law were excessively long the draftsmen should draft the rule following the wordings of s 243 BGB instead. The meeting accepted this proposal.¹¹⁹

It is noteworthy that in their presence Guyon and Laung Sarasastraphan, the recorder, had an equal voice to that of the draftsmen.¹²⁰ The drafting committee had lively debates over the theoretical foundations of the provisions concerned since both of them seemed to champion French law while being more cautious about adopting German law. It is also interesting to note that, after the drafting of the Code of 1925 resumed in May, Guyon began to be absent from the meetings while Laung Sarasastraphan continued attending but with abstention from debating. Laung Sarasastraphan was absent from the meetings after 10 June, and another Thai official replaced him as recorder. This replacement acted as a mere administrative officer and did not participate in the discussions.

On rare occasions, the draftsmen amended the wording they copied from the foreign models to suit the needs of the Thai people. For example, on 22 August, the meeting reconsidered a provision concerning Effect of Obligations drafted in the previous meeting. Cazeau suggested that the article was still imperfect and therefore needed to be amended in accordance with Article 269 of the Civil Code of Tunisia and that the notice which the creditor had to give to the debtor to perform his obligation within a reasonable time should be in writing. Chitr, chair of the meeting, adopted his suggestion about copying the Tunisian provision but argued that a written notice might be impractical for some groups of Thai people, especially those who were not able to write and those who lived in the suburbs. The meeting favoured Chitr's argument.¹²¹

After completing a certain number of provisions in English, the draftsmen submitted the complete draft to the High Revising Committee. The first submission of the draft of the first sixty-seven articles took place on 18 July,¹²² and by 28 July the High Revising Committee completed examining the draft and translating it into

¹¹⁹ 'Meeting Minutes' (18 August 1925) 2-3.

¹²⁰ See eg the minutes of the meetings on 3, 6, 10, 13, 17 and 24 March 1925.

¹²¹ 'Meeting Minutes' (22 August 1925) 1-2.

¹²² Letter from Phraya Manavarajasevi to Prince Paribatra (18 July 1925) in 'Book of the Revised Drafts', 10.

Thai.¹²³ It is not surprising that the revisers spent less than two weeks examining and translating sixty-seven provisions. This is because they were busy senior government officers, mostly cabinet ministers without legal backgrounds.¹²⁴ This may also explain why, in every meeting of the revisers, a draftsman was required to be present to provide explanations regarding the draft when needed¹²⁵ and why they only made some minor linguistic corrections on the English drafts. For example, when examining the draft of Articles 163 to 81, the revisers only removed one word from Article 165.¹²⁶

The High Revising Committee initially expected to receive both the English draft and its Thai translation.¹²⁷ However, most likely due to miscommunication between the two organisations, the first English draft without the Thai translation was sent. To avoid delay, the revisers decided to translate the draft into Thai themselves, and for reason of consistency they kept this practice until they finished examining Book I. The codification work on Book II was slightly different. Plod instructed one of his assistants to translate the English draft of some first provisions of Book II¹²⁸ and submitted the Thai translation along with the original draft to Prince Paribatra, who was satisfied with Plod's initiative and thus asked Plod to keep providing the revisers with both English and Thai versions of the drafts to correct.¹²⁹

CONCLUSION

The adoption of the copying method in the drafting of the Code of 1925 was influenced by external and internal factors. The external factor was worsening consular jurisdiction while the internal was conscientiousness of lawmakers and the draftsmen, notably Plod, who were instrumental in setting aside the Code of 1923 and introducing the Japanese model to the ruling elites. The examination of the

¹²³ Letter from Phraya Manavarajasevi to Prince Paribatra (29 July 1925) in *ibid*, 60.

¹²⁴ Prince Paribatra, the President of the High Revising Committee, admitted that the members of the Committee lacked legal language skills. Letter from Prince Paribatra to Phraya Manavarajasevi (19 July 1925) in *ibid* 38.

¹²⁵ Letter from Chao Phraya Abhai Raja, Minister of Justice, to members of the Committee of Legislation dated (22 July 1925) in *ibid* 41.

¹²⁶ 'Meeting Minutes' (22 August 1925) 4.

¹²⁷ Letter from Prince Paribatra to Phraya Manavarajasevi (19 July 1925) in 'Book of the Revised Drafts' 38.

¹²⁸ Letter from Phraya Manavarajasevi to Prince Paribatra (8 September 1925) in *ibid* 102.

¹²⁹ Letter from Prince Paribatra to Phraya Manavarajasevi (9 September 1925) in *ibid* 125.

drafting process reaffirms that the reception of foreign private law in the Thai Code is a perfect example of Alan Watson's legal transplants: the draftsmen's main concern was the copying of the texts of the rules and they did not investigate the principles behind the legal rules they copied. The draftsmen put their trust in the English publications of the German and Japanese Civil Codes, especially De Becker's *Annotated Civil Code of Japan*, which led Plod into believing that the Minpō of 1898 was a reflection of the BGB. But the question is 'is this belief correct?'. We will find the answer in the next three chapters which examine legal borrowing specifically and will also examine whether Watson's claim that successful legal borrowing does not require 'a systematic knowledge of the law' is valid.

CHAPTER 4

THE GERMAN CONCEPT OF SPECIFIC PERFORMANCE

INTRODUCTION

Two important facts about the drafting of the Civil and Commercial Code of 1925 ('Code of 1925') were considered in Chapter 3 above. First, when drafting the Code of 1925, the draftsmen copied English translations of foreign provisions. Second, the BGB was the main model for the Thai Code, but the Japanese Civil Code of 1898 ('Minpō of 1898') was also heavily relied upon because of Plod's belief that it was a copy of the German Code. These findings have provided a general idea of how legal borrowing took place in Thailand in 1925. However, the examination of the borrowing of foreign law is not the only aim of this thesis. It also seeks to discover the consequences of the use of the copying method, or in other words the success of reception to examine particularly whether Alan Watson's contention that a successful legal transplant does not require 'a systematic knowledge of the law' is correct. The success of reception cannot be determined only from the general investigation of the drafting process conducted in Chapter 3 but also requires a thorough exploration of the reception of each rule or concept of the Code of 1925. To investigate every provision or every concept is, however, not a possible approach within the context of a PhD thesis. This thesis therefore selects a particular example as a case study, namely specific performance. The results obtained from the research on this case study will provide not only the answer to the question about whether the reception of the concept of specific performance was successful but will also contribute a wider picture of the development of the law which was borrowed.

Since the BGB provided the principal blueprint for the Code of 1925, the research on the reception of specific performance and the success of reception begins with the German concept of specific performance. This is based on the presumption that the German concept of specific performance, including the relevant rules in the BGB, were used by the draftsmen of the Code of 1925 as the principal model for the Thai rules of specific performance. However, they did not

simply copy the entire system of breach of contract directly from German law. Some provisions were copied indirectly from Japanese law. The Japanese concept of specific performance will be examined in the next chapter. The concept of specific performance has been chosen as the subject of this research because it is not only one of the defining distinctions between civil law and common law but because there are also differences within the civil law family. John Dawson observed that ‘the contrast between the French and the German treatment of specific performance is one among many demonstrations of the great differences between the ‘civil law’ system’.¹ In Germany, the primacy of specific performance has long been upheld,² and it was not undermined by the reform of the German law of obligations, mainly breach of contract, in 2002.³ This distinctiveness of the German concept of specific performance will pave the way for the examination of the consequences of reception in Chapter 6 in the sense that the distinction between major legal systems regarding specific performance makes it easier to identify which legal tradition the Thai concept of specific performance has followed.

This chapter therefore explores the historical development of the primacy of specific performance in German law mainly until 1925 and enquires whether knowledge about this principle was available to the draftsmen of the Code of 1925 when they drafted the provisions concerning specific performance. Since their principal source of knowledge of the BGB was Ernest Schuster’s book *The Principles of German Civil Law*,⁴ it will be the subject of this enquiry, which will help us ascertain in Chapter 6 whether the draftsmen had knowledge of these foreign rules of specific performance when they copied them. Although Chapter 3 above showed that the focus of the drafting was on the text of the rules and not the principles behind them, this does not provide definite proof that the draftsmen blindly copied foreign rules concerning specific performance.

¹ John P Dawson, ‘Specific Performance in France and Germany’ (1959) 57 Mich L Rev 495, 525. See also Ernst J Cohn, *Manual of German Law* (2nd edn, BIICL 1968) 94.

² K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 472; Cohn, *ibid*; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 43; Dagmar Coester-Waltjen, ‘The New Approach to Breach of Contract in German Law’ in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 138.

³ Coester-Waltjen, *ibid*.

⁴ Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982) 8.

1. THE DEVELOPMENT OF SPECIFIC PERFORMANCE IN THE GERMAN LEGAL TRADITION PRIOR TO THE BGB

1.1 Specific Performance in Roman law and the *ius commune*

The BGB was the product of Pandectism, the dominant German school of legal thought in the nineteenth century.⁵ Since the main interest of the Pandectists was to develop systems and concepts out of the substantive *ius commune*,⁶ the BGB can be considered a product of the reception of Roman law in Germany, which, in Franz Wieacker's terminology, may be called 'the *intellectualization* of German law'.⁷ It should be borne in mind that this process was not an isolated event in European legal history but in fact part of the whole European movement of intellectualisation.⁸ This European movement began after the rediscovery of Justinian's Digest in Italy in the eleventh century, which resulted in a renewed interest in the studies of Roman law. From the twelfth century, Bologna became the learning centre of Roman law, which attracted thousands of students across Europe.⁹ These students returned to their homelands with common learned law and legal methodology. This 'historical process...gradually soldered differing people together into one cultural and professional amalgam by means of a common method based in the use of one language – Latin – and by an appeal to common legal concepts, doctrines, and institutions'.¹⁰ It is this process carried out by German learned men that caused, in Germany, 'an almost revolutionary change in legal personnel, legal education, legal thinking, in trials, judicature, and most written sources of law'.¹¹ Since the reception of Roman law in Germany was part of European legal development, to understand the legal rules of the BGB we need to understand their development in European legal history. However, this thesis does not intend to repeat well-documented studies on the development of specific

⁵ Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Tony Weir tr, Clarendon Press 1996) 376, 379; Zweigert and Kötz, *Introduction to Comparative Law* 144; Arthur von Mehren and James Russell Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little, Brown 1977) 78.

⁶ Wieacker, *ibid* 341.

⁷ *ibid* 95.

⁸ Paul Koschaker, *Europa und das römische Recht* (4th edn, CH Beck 1966) 142; Wolfgang Kunkel, 'The Reception of Roman Law in Germany: An Interpretation' in Gerald Strauss (ed), *Pre-Reformation Germany* (Macmillan 1972) 265; Wieacker, *History of Private Law* 97.

⁹ Peter Stein, *Roman Law in European History* (CUP 1999) 52.

¹⁰ Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800* (Lydia G Cochrane tr, Catholic University of America Press 1995) 219.

¹¹ Wieacker, *History of Private Law* 97.

performance in European legal history, for example Tilman Repgen's *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft*, *The Right to Specific Performance: the Historical Development* edited by Jan Hallebeek and Harry Dondorp, and Janwillem Oosterhuis's *Specific Performance in German, French and Dutch Law in the Nineteenth Century*. Instead, it provides an overview of the historical basis of the German concept of specific performance before discussing the rules of specific performance in the BGB.

Whether specific performance existed in classical Roman law is a matter of controversy. Many scholars hold the view that damages were the only remedy available for non-performance, owing to the nature of the formulary procedure, and therefore conclude that specific performance was not recognised under Roman law.¹² Laurens Winkel, however, has argued that specific performance existed in Roman society long before the time of Justinian.¹³ It was, at least, used as a procedural means to enforce a court decision that the debtor could be temporarily enslaved until he performed his duty.¹⁴ However, the development of the Roman concept of specific performance seems to be significantly determined by changing economic conditions.¹⁵ After the introduction of the use of coined money to the Roman Empire around 200 BC, the use of specific performance became much less evident.¹⁶ As specific performance was in decline, the principle of *condemnatio pecuniaria*, a condemnation to pay a sum of money, came to the fore. Under the formulary system of Roman procedure, every action had a *formula* which could be found in the Praetorian Edict. The final part of the *formula*, known as the *condemnatio*, directed the judge to decide the case.¹⁷ According to the principle of *condemnatio pecuniaria*, 'every judgement for a performance had to be for a definite sum of money'.¹⁸ The logic behind this principle may be that a Roman citizen could not lose his freedom merely because he did not fulfil his obligations and 'by fixing an exact

¹² WW Buckland, *Equity in Roman Law: Lectures Delivered in the University of London, at the Request of the Faculty of Laws* (University of London Press 1911) 40; WW Buckland, *Roman Law & Common Law: A Comparison in Outline* (CUP 1936) 327; Dawson, 'Specific Performance' 496; Edward Fry, *A Treatise on the Specific Performance of Contracts* (2nd edn, Stevens and Sons 1881) 3.

¹³ Laurens Winkel, 'Specific Performance in Roman Law' in Jan Hallebeek and Harry Dondorp (eds), *The Right to Specific Performance: The Historical Development* (Intersentia 2010) 9.

¹⁴ Okko Behrends, *Der Zwölftafelprozess: zur Geschichte des römischen Obligationenrechts* (Schwartz 1974) 118.

¹⁵ Zimmermann, *Law of Obligations* 772.

¹⁶ Max Kaser and Karl Hackl, *Das römische Zivilprozessrecht* (2nd edn, CH Beck 1996) 126–27.

¹⁷ Paul J du Plessis, *Borkowski's Textbook on Roman Law* (4th edn, OUP 2010) 74.

¹⁸ Max Kaser, *Roman Private Law* (Rolf Dannenbring tr, 2nd edn, Butterworths 1968) 150. See also *ibid*; JM Kelly, *Roman Litigation* (Clarendon Press 1966) 69.

amount for ransom, anybody who could raise this sum, was to be enabled to liberate the debtor'.¹⁹ A confirmation of the existence of this remedy is a text of Gaius, Institute Iv.48, which states that damages were the only remedy for non-performance under classical Roman law.²⁰ Gaius's statement is, however, contradicted by a controversial text of Ulpian, D. 6.1.68, which was produced around fifty years later. This text suggests that specific performance was available at the time.²¹ The origin of this text is a matter of controversy. Since Justinian's compilers revised it to express common practice at the time,²² some scholars suggest that the text was interpolated by Justinian, and therefore it may not reflect the actual situation at the time of Ulpian.²³ Following the inflation problem which the Roman Empire experienced during the post-classical era,²⁴ specific performance was reintroduced to replace damages. Around 342 AD, the Roman system of procedure changed from the formulary system to the *cognitio* procedure.²⁵ Max Kaser contended that under this new procedure, 'the principle of *condemnatio pecuniaria* was no longer valid; judgement could also be for performance other than payments of money, and such performance was directly enforced by execution'.²⁶ This theory and especially Kaser's reference to the texts C. 7.4.17, C. 6.2.22.3, C. 7.54.3.3 and C. 7.39.8.3²⁷ as proof of the dominance of specific performance and the abolition of the principle of *condemnatio pecuniaria* in Justinian law were rejected by Winkel, who argued that damages were still in use during Justinian's time.²⁸

¹⁹ Kaser, *ibid.*

²⁰ [Iv.48] In formulae containing a condemnatory clause the actual condemnation is always in a money estimate; and even if our claim be for some corpus, – land, a slave, a garment, gold, silver, the judge does not condemn the defender in the thing itself, as used to be done under the older system but, having put a value upon it, condemns him in money. Gaius and Ulpian, *The Institutes of Gaius and Rules of Ulpian: The Former from Studemund's Apograph of the Verona Codex* (James Muirhead tr, T&T Clark 1895) 294.

²¹ [D. 6.1.68 Ulpian, Edict, book 51] A party is ordered by the judge to hand something over, does not obey, and claims that he is unable to do so. If, indeed, he has the thing, then he is dispossessed by armed force at the judge's direction, and the judgment against him is restricted to profits and matters arising out of the action. Theodor Mommsen and Paul Krueger, *The Digest of Justinian*, vol 1 (Alan Watson tr, Penn Press 1985) 210–11. See also Winkel, 'Specific Performance' 11.

²² Roberto Fiori, 'The Roman Conception of Contract' in Thomas AJ McGinn (ed), *Obligations in Roman Law: Past, Present, and Future* (University of Michigan Press 2012) 58; Dawson, 'Specific Performance' 501.

²³ Kaser and Hackl, *Das römische Zivilprozessrecht* 626.

²⁴ Richard Duncan-Jones, *The Economy of the Roman Empire: Quantitative Studies* (2nd edn, CUP 1982) 66. See the economic aspect of the *condemnatio pecuniaria* in Kelly, *Roman Litigation* 69–84.

²⁵ Du Plessis, *Textbook on Roman Law* 79.

²⁶ Kaser, *Roman Private Law* 150.

²⁷ Kaser and Hackl, *Das römische Zivilprozessrecht* 609–10.

²⁸ Winkel, 'Specific Performance' 15–16.

Whether *condemnatio pecuniaria* continued to exist during Justinian era and specific performance was the only remedy under the *Corpus iuris civilis* is debatable, but what is certain about these two concepts is they were not systematised by Justinian's compilers and their relationship was not the same as it is today.²⁹ In Justinian's law the nature of these two remedies was procedural, and they concerned 'the issue of enforcement'.³⁰ One may think that the Roman concept of specific performance is a crudely primitive form of the modern one, but if Roman law lays the foundations for the German concept of specific performance there must be a fundamental change in concept that makes the Roman and German rules of specific performance greatly different.

The revival of the study of Roman law by the glossators of Bologna in the late eleventh century marked the new era of European legal studies.³¹ 'European jurisprudence and the continental legal tradition emerged within the context of the twelfth century'.³² The glossators 'regarded Justinian's texts as sacred and ascribed to them almost biblical authority'.³³ They believed that they contained no contradictions and that they provided the solutions to all legal problems.³⁴ Their duty was thus to explain and expound the texts of Roman law.³⁵ The glossators tried to 'build them into a coherent doctrinal structure'³⁶ while the correction of the corrupt texts was not their concern.³⁷ The study of Roman law by the glossators and growth of canon law laid the foundations for European legal science, which led to common legal tradition and common law of Europe, the *ius commune*.³⁸ The development of the *ius commune* nurtured the conceptualisation and systematisation of specific performance.

²⁹ Kaser, *Roman Private Law* 150.

³⁰ Janwillem Oosterhuis, *Specific Performance in German, French and Dutch Law in the Nineteenth Century: Remedies in an Age of Fundamental Rights and Industrialisation* (Martins Nijhoff 2011) 27. See also Zimmermann, *Law of Obligations* 6.

³¹ Wieacker, *History of Private Law* 28–30; John P Dawson, *The Oracles of the Law* (WS Hein 1986) 124–25.

³² Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP 2009) 237. See also Paul Vinogradoff, *Roman Law in Medieval Europe* (2nd edn, Clarendon Press 1929) 43; RC van Caenegem, *An Historical Introduction to Private Law* (DEL Johnston tr, CUP 1992) 47. For more information about the creation of the *ius commune*, see John W Cairns and Paul J du Plessis (eds), *The Creation of the Ius Commune: From Casus to Regula* (EUP 2010).

³³ Stein, *Roman Law* 46.

³⁴ *ibid.*

³⁵ *ibid.*; Dawson, *Oracles of the Law* 124; Wieacker, *History of Private Law* 32–33. See also Harry Dondorp and Eltjo JH Schrage, 'The Sources of Medieval Learned Law' in John W Cairns and Paul J du Plessis (eds), *The Creation of the Ius Commune: From Casus to Regula* (EUP 2010) 21–22.

³⁶ Wieacker, *ibid.* 34.

³⁷ *ibid.*; Dawson, *Oracles of the Law* 124; Stein, *Roman Law* 46.

³⁸ Lesaffer, *European Legal History* 237.

Despite the fact that the *Corpus iuris* appears to treat specific performance as a procedural means, the glossators discussed it as an issue of substantive law³⁹ which revolved around the contract of sale.⁴⁰ On the question of a transfer of ownership, they all seemed to agree that the creditor must claim for specific performance, not damages⁴¹ but held different views on the question of the delivery of the object sold⁴² due to the fact that this obligation could be categorised as the obligation to do something. Based on D. 42.1.13.1,⁴³ most of the leading glossators rejected specific performance as the enforcement of delivery.⁴⁴ However, a leading glossator Martinus (around 1100-67) maintained that the creditor could enforce the vendor to perform his duty specifically on the ground of equity ‘– equity being a corrective to a general rule found in the *Corpus juris*, viz. that a debtor discharges his obligation to do by paying damages’.⁴⁵ As for obligations to do something, D. 42.1.13.1 merely provided a source of discussion of whether the debtor could choose damages over specific performance, but there was no general rule that acts must be resolved in damages, such as the concept *nemo praecise cogi potest ad factum*, which was developed in France in at the beginning of the seventeenth century.⁴⁶ Other leading glossators, notably Azo (1190-1220) and Accursius (around 1182-1260), were of the opinion that, if the law permitted, damages could be sought as an exception to the general rule that obligations to do something must be enforced specifically.⁴⁷

Although they continued the work of glossators, the commentators used a different method to study the texts of the *Corpus iuris*: they wrote in-depth commentaries on every part of the code of Justinian but added personal legal

³⁹ Zimmermann, *Law of Obligations* 6; Oosterhuis, *Specific Performance* 27; Harry Dondorp, ‘Specific Performance: A Historical Perspective’ in JM Smits and others (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia 2008) 268.

⁴⁰ Dawson, ‘Specific Performance’ 503; Dondorp, *ibid* 269.

⁴¹ Dondorp, *ibid*.

⁴² Dawson, ‘Specific Performance’ 503; *ibid*.

⁴³ [42.1.13.1 Celsus, Digest, book 6] If someone should promise that he will prevent the stipulator from suffering any harm and he so acts that no harm does arise out of the matter, he performs his promise; if not, since he has not done what he said he would, he is to be condemned in money damages just as would be the case in any other action on a stipulation to do something. Theodor Mommsen and Paul Krueger, *The Digest of Justinian*, vol 4 (Alan Watson tr, Penn Press 1985) 537.

⁴⁴ Harry Dondorp, ‘Precise cogi: Enforcing Specific Performance in Medieval Legal Scholarship’ in Jan Hallebeek and Harry Dondorp (eds), *Right to Specific Performance: The Historical Development* (Intersentia 2010) 23; Dawson, ‘Specific Performance’ 503.

⁴⁵ Dondorp, *ibid* 23. See also Tilman Repgen, *Vertragstreue und Erfüllungszwang in der mittelalterlichen Rechtswissenschaft* (F Schöningh 1994) 56; Dawson, *ibid*.

⁴⁶ Dondorp, *ibid*.

⁴⁷ Dondorp, ‘Specific Performance’ 271.

opinions (*consilia*) on numerous practical questions.⁴⁸ One of the best known commentators is Bartolus (1314-57) who reinforced the distinction between obligations to give and obligations to do.⁴⁹ Bartolus adopted this distinction to explain the availability of specific performance.⁵⁰ Before his time, there was 'no fundamental distinction between contractual obligations and other duties' in the *ius commune*⁵¹ since medieval jurists adopted different approaches to distinguishing situations where specific performance was available. Bartolus brought 'the various distinctions together in a single, coherent system'.⁵² According to Dawson, 'the authority of Bartolus was so enormous that his adoption of this distinction... made it a familiar part of civilian doctrine thereafter'.⁵³ Regarding obligations to do something, Bartolus distinguished between being bound by law, by testament and by agreement. The obligations of the first two types were to be performed specifically while contractual obligations could be discharged by payment of damages⁵⁴ on the grounds that 'when the debtor was in default of his contractual obligation to do something the law added an obligation to pay damages to this main obligation, and upon payment the creditor had obtained his interest in the contract after all'.⁵⁵ However, Bartolus, like most of the glossators, viewed an obligation to deliver the object sold as an obligation to do something, but he explained that, because it could also be regarded as an obligation to transfer the ownership, the vendor was specifically obliged to make delivery.⁵⁶ Although his contemporaries and followers did not always agree on his interpretation of the Roman rules of specific performance,⁵⁷ Bartolus left at least two important legacies for subsequent development of specific performance: the adoption of the distinction between

⁴⁸ Van Caenegem, *Historical Introduction* 52; Bellomo, *Common Legal Past* 147–48; Stein, *Roman Law* 71.

⁴⁹ The distinction between the objects of obligations can be traced back to Roman law where the text D. 44. 7. 3 illustrates the recognition of the distinction between *dare*, *facere*, and *praestare*. In a broad sense, *dare* focuses on 'the transfer of quiritary ownership', *facere* concerns 'all kinds of acts (including dare) as well as omissions, and *praestare* vaguely implies 'a guarantee for a certain result'. Zimmermann, *Law of Obligations* 6. See also George Mousourakis, *Fundamentals of Roman Private Law* (Springer 2012) 189.

⁵⁰ Dawson, 'Specific Performance' 504–05.

⁵¹ Dondorp, 'Precise cogi' 24. Gaius attempted to distinguish between obligations arising from contract and those arising from delict (G. 3.88) but soon realised that this distinction was inadequate because there were also obligations that arose from other events. See Peter Birks, 'Definition and Division: A Meditation on Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 18.

⁵² Dondorp, *ibid* 50.

⁵³ Dawson, 'Specific Performance' 505.

⁵⁴ Dondorp, 'Specific Performance' 272.

⁵⁵ Oosterhuis, *Specific Performance* 31.

⁵⁶ Bartolus, ad D. 45.1.72 No 39. See also Repgen, *Vertragstreue* 200-01; Dondorp, 'Precise cogi' 40, 50-51.

⁵⁷ Dondorp, *ibid* 51–52.

obligations to give and obligations to do to explain specific performance and the general rule that obligations to do resolves themselves into damages.⁵⁸

By the end of the fifteenth century the *ius commune* developed by Bartolus and his followers, had expanded throughout Europe with the help of university professors and trained jurists who were increasing in number.⁵⁹ Subsequent debate about specific performance in the *ius commune* revolved around Bartolus's legacy. In 1601 the maxim *nemo praecise potest cogi ad factum* was coined by a French jurist Antoine Favre (1557-1624). Favre explained that '[t]o justify the principle that one cannot be forced to an act – *precise* [sic] expresses that the debtor cannot choose to pay damages instead...acts cannot be enforced without the use of physical force against the debtor; hence a payment of damages succeeds the obligation to do something'.⁶⁰ Since then this maxim became a focus of debate on specific performance in the *ius commune*.⁶¹ Jurists held different views on specific performance throughout the early modern period, but no view proved to be as influential as that of the French jurist Robert Joseph Pothier (1699-1772) whose works, a product of 'the application of rationalistic methods to existing law, in particular Roman law and customary law',⁶² provided the foundation for the French *Code civil* of 1804.⁶³ The Code's influence extended beyond the French territories and its promulgation 'was also a major event in the history of German private law' as several German states, such as the Rhineland and Baden, later enacted their own law modelled on it.⁶⁴

Most of the rules concerning the law of obligations, including those relating to specific performance, in the *Code civil* derived from the works of Pothier.⁶⁵ Pothier drew a basic distinction between obligations to give and obligations to do and not to do.⁶⁶ For obligations to give, the creditor has the right to compel the debtor to

⁵⁸ Dawson, 'Specific Performance' 505; Dondorp, 'Specific Performance' 274.

⁵⁹ Wieacker, *History of Private Law* 56–57; Stein, *Roman Law* 75.

⁶⁰ Dondorp, 'Precise cogi' 21.

⁶¹ Helmut Coing, *Europäisches Privatrecht*, vol 1 (Beck 1985) 432–33.

⁶² Oosterhuis, *Specific Performance* 68.

⁶³ Stein, *Roman Law* 114.

⁶⁴ Wieacker, *History of Private Law* 274.

⁶⁵ Dawson, 'Specific Performance' 509; George Vlavianos, 'Specific Performance in the Civil Law: Mediating between Inconsistent Principles Inherited from a Roman-Canonical Tradition via the French *Astreinte* and the Québec *Injunction*' (1993) 24 *Revue Generale de Droit* 515, 525–26.

⁶⁶ Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, vol 1 (William David Evans tr, A Strahan 1806) 82–84.

perform his duty specifically⁶⁷ while for obligations to do and not to do the creditor could only claim damages. Pothier wrote:

When a person is obliged to do any act, this obligation does not give the creditor a right of compelling the debtor specifically to perform the act which he is obliged to do, but only a right to have him condemned in damages for not performing his obligation. To this obligation of damages, all obligations of doing any act may be resolved, for *nemo potest praecise cogi ad factum*... When a person is obliged not to do any act, the right which this obligation gives the creditor, is that of proceeding against the debtor, in case of his contravening the obligation to recover the damages, arising from such contravention.⁶⁸

Pothier's conception of the maxim *nemo potest praecise cogi ad factum* was readily accepted by the French draftsmen and legislative body and was incorporated into the French Code.⁶⁹ It is reflected in Article 1142 that obligations to do and not to do resolved themselves into damages.⁷⁰ To understand why this concept was adopted in the *Code civil*, as John Dawson has pointed out, one needs to consider the political climate in France in the late eighteenth century. The French Revolution resulted in the spread of liberalism throughout the country and fostered public feeling against arbitrary power, including distrust of the judicial powers of judges who were controlled by the Parlements, institutions of noble and bourgeois privileges, under the *ancien régime*.⁷¹ Pothier's influence also extended to the next two provisions concerning obligations to do and not to do (Articles 1143⁷² and 1144⁷³).⁷⁴ His conception of performance was that the enforcement of performance varied depending upon types of obligations.⁷⁵ This was consistent with his recognition of

⁶⁷ *ibid* 86–87.

⁶⁸ *ibid* 89.

⁶⁹ Dawson, 'Specific Performance' 510.

⁷⁰ *Code civil*, art 1142: 'Any obligation to do and not to do resolves itself into damages, in case of non performance on the part of the debtor', <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf> accessed 4 February 2013.

⁷¹ Dawson, 'Specific Performance' 510. See also Dawson, *Oracles of the Law* 273–78.

⁷² *Code Civil*, art 1143: 'Nevertheless, a creditor is entitled to request that what has been done through breach of the undertaking be destroyed; and he may have himself authorized to destroy it at the expense of the debtor, without prejudice to damages, if there is occasion', <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf> accessed 4 February 2013.

⁷³ *Code Civil*, art 1144: 'A creditor may also, in case of non-performance, be authorized to have the obligation performed himself, at the debtor's expense', *ibid*.

⁷⁴ Dawson, 'Specific Performance' 510.

⁷⁵ Oosterhuis, *Specific Performance* 128.

the distinction of obligations, which was also adopted in establishing Article 1126⁷⁶ and became a fundamental principle of the French law of obligations.⁷⁷ Article 1142 appears to effectively place specific performance and damages in equal positions. However, in the drafting the rules concerning performance, the French draftsmen did not rely solely on Pothier, they also looked at theories of other jurists, notably Jean Domat (1625-96). Domat's conception of performance, borrowed in drafting Article 1134,⁷⁸ can be compared with s 241 BGB. It states:

Agreements lawfully entered into take the place of the law for those who have made them.

They may be revoked only by mutual consent, or for causes authorized by law.

They must be performed in good faith.⁷⁹

This article implies that 'all obligations have to be actually performed regardless of their nature'.⁸⁰ This implication is consistent with Article 1184, which, in case of non-performance, gives the creditor the right to choose between enforcement of performance, where possible, and rescission accompanied with the right to compensation for damage. However, rescission can only be sought through court judgment.⁸¹ Unlike Article 1142, the distinction of obligation is not a consideration for determining the right to performance in Article 1184, which implies that the debtor can claim performance regardless of the nature of the obligation. The conflict between Pothier's and Domat's doctrines has polarised the understanding and

⁷⁶ *Code civil*, art 1126: 'Any contract has for its object a thing which one party binds himself to transfer, or which one party binds himself to do or not to do', <http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf> accessed 4 February 2013. See also Dawson, 'Specific Performance' 510.

⁷⁷ Marcel Planiol, *Treatise on the Civil Law*, vol 2:1 (Louisiana State Law Institute tr, St Paul 1959) 103; Dawson, 'Specific Performance' 510.

⁷⁸ Yves-Marie Laithier, 'Comparative Reflections on the French Law of Remedies for Breach of Contract' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 105.

⁷⁹ *Code civil*, art 1134.

<http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf> accessed 4 February 2013.

⁸⁰ Oosterhuis, *Specific Performance* 128.

⁸¹ *Code civil*, art 1184: 'A condition subsequent is always implied in synallagmatic contracts, for the case where one of the two parties does not carry out his undertaking.

In that case, the contract is not avoided as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfil the agreement when it is possible, or to request its avoidance with damages.

Avoidance must be applied for in court, and the defendant may be granted time according to circumstances', *ibid*.

interpretation of the French concept of specific performance.⁸² For Marcel Planiol (1853-1931), an eminent French jurist and author of a famous series of books on French civil law, the creditor's right to performance is the primary remedy for non-performance.⁸³ But the existence of Article 1142 meant that the primacy of specific performance in French law was not as clear-cut as in German law. This will be discussed below. There are still French jurists today who do not agree with Planiol's view. Denis Tallon, a renowned French scholar, for example, argued that 'it is a fundamental rule of French law that all remedies are equivalent and that the aggrieved party has a free choice among them'.⁸⁴

1.2 The formation of the principle of the primacy of specific performance in Germany in the nineteenth century

While the maxim *nemo potest praecise cogi ad factum* is the dominant character of the French concept of specific performance, in nineteenth-century Germany the notion that specific performance was the primary claim for all obligations prevailed in most parts of Germany, especially the states where the *gemeines Recht* applied.⁸⁵ The principle of the primacy of specific performance developed 'in harmony with the socio-economic condition of the German states at the beginning of the nineteenth century',⁸⁶ and it was fostered by 'writers of the late *usus modernus*, Pandectists and other legal scholars'.⁸⁷ Oosterhuis observed that the right economic condition for the development of specific performance was the primary remedy for non-performance in early nineteenth-century Germany:

⁸² See the conflicting notions of specific performance in French law in Laithier, 'Comparative Reflections' 113–16. See also Solène Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP 2012) 37–42.

⁸³ Planiol, *Treatise on the Civil Law* 100, 105.

⁸⁴ Denis Tallon, 'Contract Law' in George Bermann and Etienne Picard (eds), *Introduction to French law* (Kluwer 2008) 232.

⁸⁵ Zimmermann, *Law of Obligations* 776; Janwillem Oosterhuis, 'Industrialization and Specific Performance in the German Territories during the 19th Century' in Jan Hallebeek and Harry Dondorp (eds), *The Right to Specific Performance: The Historical Development* (Intersentia 2010) 99; Franz Dorn, 'Begriff des Schuldverhältnisses und Pflichten aus dem Schuldverhältnis' in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB: Band II: Schuldrecht: Allgemeiner Teil 1: Teilband: §§ 241-304* (Mohr Siebeck 2007) 147–58; Tilman Repgen, '§§ 362-371. Erfüllung' in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *ibid* 2138.

⁸⁶ Oosterhuis, *Specific Performance* 88–89. See also Dorn, *ibid* 151–58.

⁸⁷ Oosterhuis, *ibid* 95.

all German territories, including for instance Prussia, the Rhineland and Baden, had a predominantly agricultural economy; trade and industry only existed on a minor scale and did not yet involve the massive transportation of new materials and goods. The principal transactions concerned land, houses and other specific (*species*) goods, and not the trade in fungible (*genus*) goods. In such an economy, actual delivery of things to which the creditor is entitled was of the utmost importance.⁸⁸

Many German scholars viewed specific performance as the normal right suitable for all types of obligations and some insisted that it was the creditor's primary remedy for non-performance.⁸⁹ In his commentary on the *Digest* Christian Friedrich Glück (1755-1831) stated that 'on the basis of Natural law everybody who had entered into a valid agreement could be coerced to the most precise performance of his promises'.⁹⁰ For Glück the distinction between obligations to give and to do was not necessary.⁹¹ Some Pandectist writers, such as Johann Nepomuk von Wening-Ingenheim (1770-1831),⁹² Georg Friedrich Puchta (1798-1846),⁹³ and Friedrich Mommsen (1818-92),⁹⁴ insisted on the primacy of specific performance in all situations, including obligations to do. Mommsen in his famous text on the law of obligations, the third volume of *Beiträge zum Obligationenrecht* published in 1855, opined that 'the pecuniary condemnation for claims...in classical Roman law...were not relevant to contemporary legal practice'.⁹⁵

Legislative trends towards specific performance in nineteenth century Germany can be illustrated by the *Allgemeines Landrecht für die preußischen Staaten* (the General National Law for the Prussian States), which came into effect in 1794. According to I.5 s 270, specific performance was recognised as the primary remedy.⁹⁶ It states 'in general, the debtor has to fulfill his obligation as he promises'.⁹⁷ Christian Friedrich Koch (1798-1872) justified this provision with the Latin maxim *pacta sunt servanda*, which means that the debtor has to fulfil his

⁸⁸ *ibid* 89.

⁸⁹ See Dorn, 'Begriff des Schuldverhältnisses' 151-58; Marc-Philippe Weller, *Die Vertragstreue* (Mohr Siebeck 2009) 102-06.

⁹⁰ Christian Friedrich von Glück, *Ausführliche Erläuterung der Pandecten nach Hellfeld*, vol 4:2 (JJ Palm 1797) 306-07 translated in Oosterhuis, *Specific Performance* 91.

⁹¹ Von Glück, *ibid* 306.

⁹² Johann Nepomuk von Wening-Ingenheim, *Lehrbuch des gemeinen Civilrechtes, Nach Heise's Grundriss eines Systems des gemeinen Civil-Rechts zum Behufe von Pandekten-Vorlesungen*, vol 2 (5th edn, EA Fleischmann 1831) 172-73. See also Oosterhuis, *Specific Performance* 93-94.

⁹³ Georg Friedrich Puchta and Adolphus Fridericus Rudorff, *Pandekten* (10th edn, JA Barth 1866) 379-80.

⁹⁴ Friedrich Mommsen, *Beiträge zum Obligationenrecht*, vol 3 (CA Schwetschke 1855) 17-18.

⁹⁵ *ibid* 18 translated in Oosterhuis, *Specific Performance* 95.

⁹⁶ Weller, *Die Vertragstreue* 100.

⁹⁷ *Allgemeines Landrecht für die preußischen Staaten*, I.5 s 270.

promise. Koch commented that an obligation could resolve itself into damages and interest if specific performance was not possible.⁹⁸ This general rule covered all kinds of obligations including obligations to do and not to do which, according to I.5 s 276, could be enforced by legal coercive methods as prescribed by the procedural rules.⁹⁹ The rules concerning enforcement of sentences were contained in a separate law, the *Revidierte Allgemeine Gerichtsordnung für die Preußischen Staaten* of 1793. This law 'clearly aimed at achieving actual enforcement of performances of acts'.¹⁰⁰ However, in 1834, the rules of the *Revidierte Allgemeine Gerichtsordnung für die Preußischen Staaten* with regard to execution of civil sentences, were replaced by a new procedural provision, which allowed the creditor to choose between performance by the debtor himself, performance by a third party, and damages and interest.¹⁰¹ The amendment of 1834 hence effectively undermined the primacy of specific performance.

Changing political and economic situations in Germany in the nineteenth century began to have some effect on the primacy of specific performance. Most German states had experienced rapid industrialisation from 1830. Industrial production processes played an increasingly important role in the German economy. This fundamental economic change affected the position of specific performance as the primary remedy. Oosterhuis pointed out that 'the time factor started to become increasingly important...the remedy of actual performance was no longer adequate for a buyer needing to receive goods in time'.¹⁰² The promulgation of the *Allgemeines Deutsches Handelsgesetzbuch* (German Commercial Code: 'ADHGB') in Germany in 1861 marked the victory of the supporters of the three-choice remedies which was modelled on Article 1184 of the *Code civil*, deemed to keep up with the demand of commercial intercourse.¹⁰³ It recognised all three remedies, specific performance, damages and rescission, which were contained in ss 355, 356 and 357 ADHGB. S 355 ADHGB gives the buyer the right to choose between specific performance, damages and rescission if the seller defaults.¹⁰⁴ However, according to s 356, if he opts for damages or rescission instead of specific performance, the buyer must give to the seller some time to perform his duty.¹⁰⁵ In case of contracts with the fixed date of

⁹⁸ Christian Friedrich Koch, *Allgemeines Landrecht für die preußischen Staaten*, vol 1 (Trautwein 1852) 362.

⁹⁹ *Allgemeines Landrecht für die preußischen Staaten*, I.5 s 276.

¹⁰⁰ Oosterhuis, 'Industrialization' 106.

¹⁰¹ *Verordnung vom 4 März 1834 über die Execution in Civilsachen* s 9 cited in *ibid* 106–07.

¹⁰² Oosterhuis, 'Industrialization' 110–11.

¹⁰³ *ibid* 117–19.

¹⁰⁴ *Allgemeines Deutsches Handelsgesetzbuch*, s 355.

¹⁰⁵ *ibid* s 356.

delivery, s 357 ADHGB allows the buyer to seek rescission or damages immediately.¹⁰⁶ Under s 357 ADHGB, specific performance was no longer the primary remedy for breach of contract with the fixed date of delivery. In fact, all the three remedies were of equal importance. It is noteworthy that the change introduced by the ADHGB of 1861 was limited only to the contract of sale. The *Civilprozeßordnung* of 1879 (Code of Civil Procedure: 'CPO'), which was enforced in the entire German Empire,¹⁰⁷ confirmed that specific performance was the primary remedy for enforcement of obligations to do and not to do something and obligations to give generic goods.¹⁰⁸ S 774 CPO provided measures to enforce obligations to do something, including betrothals.¹⁰⁹ As long as the performance neither requires special skills from the debtor nor depends solely on his will, the debtor can be compelled to perform his obligation by means of money fine or detention.¹¹⁰ The same kinds of measures were also adopted in enforcement of obligations not to do something as stated in s 775 CPO.¹¹¹ However, s 774 CPO rejected enforcement of matrimonial cohabitation while betrothals were still enforceable but only indirectly through compensation. Following the drafting of the BGB, which came into effect in 1900, the CPO was amended in the same year. Betrothals could no longer be enforced through specific implement.¹¹²

Despite some economic, social and legislative changes over the course of the nineteenth century, by the time that the BGB was enacted, the principle of the primacy of specific performance had taken root in Germany.

2. SPECIFIC PERFORMANCE IN THE BGB

2.1 The primacy of specific performance in the BGB

The BGB, which came into force in 1900, was the product of Pandectism and is often said to have mirrored the social, political and economic situations of Germany at the beginning of the twentieth century.¹¹³ This German Code had admirers not only in

¹⁰⁶ *ibid* s 357.

¹⁰⁷ It was promulgated in 1877.

¹⁰⁸ Repgen, '§§ 362-371' 2124, 2138.

¹⁰⁹ Oosterhuis, 'Industrialization' 121.

¹¹⁰ *Civilprozeßordnung*, s 774.

¹¹¹ *ibid* s 775.

¹¹² Oosterhuis, 'Industrialization' 121.

¹¹³ Wieacker, *History of Private Law* 380.

the West, where scholars, such as Frederic William Maitland (1850-1906), viewed it as 'a great achievement'¹¹⁴ but also in the East, especially in Japan and Thailand, where it provided the basis for their civil codes. However, some were not impressed with this product of 'the deep, exact, and abstract learning of the German Pandectist School'.¹¹⁵ According to Konrad Zweigert and Hein Kötz's subsequent assessment, the BGB

... is not addressed to the citizen at all, but rather to the professional lawyer; it deliberately eschews easy comprehensibility and waives all claims to educate its reader; instead of dealing with particular cases in a clear and concrete manner it adopts throughout an abstract conceptual language which the lay-man, and often enough the foreign lawyer as well, finds largely incomprehensible, but which the trained expert, after many years of familiarity, cannot help admiring for its precision and rigour of thought.¹¹⁶

These advantages and disadvantages of the BGB can be illustrated in the provisions concerning non-performance and remedies for non-performance. Under the BGB, there was neither a unitary concept of breach of contract nor a generalisation about the rights of the party aggrieved by non-performance of a contractual obligation.¹¹⁷ In fact, the BGB only recognised two types of non-performance: where non-performance was caused by impossibility and where the debtor fails to perform his promise because of delay. This structure has followed the authoritative view of Frederick Mommsen that all kinds of irregularity of performance could be caused either by impossibility or delay.¹¹⁸ The third category, positive breach of contract (*positive Vertragsverletzungen*), had to be developed by the German courts and lawyers who soon realised that there were some forms of non-performance which fell outside impossibility and delay.¹¹⁹ This disintegration of the concept of

¹¹⁴ Frederic William Maitland, 'The Making of the German Civil Code' in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 3 (CUP 1911) 484.

¹¹⁵ Zweigert and Kötz, *Introduction to Comparative Law* 144. See also Zimmermann, *New German Law of Obligations* 27–30.

¹¹⁶ Zweigert and Kötz, *ibid*.

¹¹⁷ Norbert Horn, Hein Kötz, and Hans Leser, *German Private and Commercial Law: An Introduction* (Tony Weir tr, Clarendon Press 1982) 93–94; Zweigert and Kötz, *Introduction to Comparative Law* 488; Basil Markesinis, Werner Lorenz, and Gerhard Dannemann, *The German Law of Obligations* (Clarendon Press 1997) 398–99; Zimmermann, *Law of Obligations* 813–14.

¹¹⁸ Friedrich Mommsen, *Die Unmöglichkeit der Leistung in ihrem Einfluß auf obligatorische Verhältnisse* (Schwetschke 1853) cited in Horn and others, *ibid* 95–96. See also Zweigert and Kötz, *ibid* 488; Zimmermann, *ibid* 809–10.

¹¹⁹ Zweigert and Kötz, *ibid* 494; Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* (BIICL 1993) 27; Cohn, *Manual of German Law* 117. However, the BGB, as reformed in 2002, for the first time recognised the concept of positive breach of contract in ss 280(1) and 241(2). For details see Andreas Heldrich and Gebhard Rehm, 'Modernisation of

breach of contract in the BGB was thought to result from the influence of the action-based Roman law system which was used by nineteenth-century German Pandectism to provide the basis for the law of obligations.¹²⁰ As a result, the BGB of 1900 dealt with contracts one by one creating a considerable number of special rules for various typical contractual regimes.¹²¹

The system of remedies for performance, another legacy of Pandectism, was developed from the contract of sale which focused on delivery of a thing. Norbert Horn, Hein Kötz and Hans Leser observed that:

Even if there were irregularity in performance, the claim for delivery of the thing itself could remain unimpaired. If the specific object could no longer be delivered, perhaps because it had been destroyed, the buyer might, as a substitute or surrogate, claim damages instead of the thing.¹²²

This statement illustrates a traditional German view of the primacy of specific performance in the BGB. However, there is no provision straightforwardly expressing the existence of this principle or the recognition of specific performance as a remedy for non-performance. One needs to have a systematic knowledge of German law of obligations to discover that the recognition of the primacy of specific performance is hidden behind a number of provisions since ‘a number of provisions assume its existence’.¹²³ This implicit recognition of specific performance reflects a general disadvantage of the BGB (1900) in that it contains several abstract rules and principles which those who do not have German private law background may find difficult to understand. In drafting s 360 BGB (1900), which concerns the right to rescission,¹²⁴ the Second Commission¹²⁵ confirmed that performance was the

the German Law of Obligations: Harmonisation of Civil Law and Common Law in the Recent Reform of the German Civil Code’ in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 127; Zimmermann, *New German Law of Obligations* 53–54.

¹²⁰ Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 378; Horn and others, *German Private and Commercial Law* 94–95.

¹²¹ Von Mehren and Gordley, *Civil Law System* 1108; Cohn, *Manual of German Law* 117. This was changed by the reform of the law of obligations in 2002, when a unified concept of breach of contract was introduced in ss 280–284 BGB. For details see Zimmermann, *New Law of Obligations* 39–78.

¹²² Horn and others, *German Private and Commercial Law* 94–95.

¹²³ Treitel, *Remedies for Breach of Contract* 51.

¹²⁴ BGB (1900), s 360: ‘If a contract is entered into with the proviso that the debtor shall forfeit his rights under the contract if he does not fulfil his obligations, the creditor is entitled to rescind the contract on failure of the debtor to fulfil it’. Wang, *German Civil Code* 80. This provision was repealed in 2002.

¹²⁵ The Second Commission was the second drafting committee of the BGB appointed by the Ministry of Justice in 1890 to succeed the First Commission of 1881, in which two eminent

contract parties' primary concern and therefore in case of non-performance, the contract could be rescinded only by law or agreement, not by a unilateral act.¹²⁶ The primacy of performance is also reflected in provisions concerning delayed performance. In case of breach of contract caused by delay, the position of specific performance as the primary right is not unaffected.¹²⁷ This is evidenced by the concepts of *Mahnung* and *Nachfrist*.¹²⁸ A general rule is that if the debtor is responsible for not performing his promise on time (s 285 BGB (1900)),¹²⁹ the creditor can be put in default by means of warning (*Mahnung*) – an unconditional request for performance (s 284(1) BGB (1900)).¹³⁰ Warning is not needed where the actual date of performance is fixed (s 284(2) BGB (1900))¹³¹ or where the debtor expressly or impliedly refuse to perform his duty.¹³² 'The purpose [of *Mahnung*] is to make clear beyond doubt that the creditor retains an interest in the performance of contract.'¹³³ The principle of the primacy of specific performance is reflected more obviously in the concept of giving a period of grace (*Nachfrist*) in the case of reciprocal contracts. Under s 326 BGB (1900)¹³⁴, the creditor must give the debtor an additional period of time to allow him to perform his duty within this period and the creditor must make it clear that upon the expiry of the period any performance will be refused. After the period of grace expires, specific performance is barred and the creditor has a choice between damages in lieu of performance or rescission. A

academics Bernhard Windscheid (1817-92) and Gottlieb Planck (1824-1910) took part. Adopting in part the controversial draft of the First Commission, the Second Commission completed its draft in 1895. The Second Draft became the BGB in 1896, which came into effect in 1900. See Wieacker, *History of Private Law* 371-74.

¹²⁶ Horst Heinrich Jakobs and Werner Schubert, *Die Beratung des Bürgerlichen Gesetzbuchs: in systematischer Zusammenstellung der unveröffentlichten Quellen* (§§ 241 bis 432) (de Gruyter 1978) 447. See also Oosterhuis, 'Industrialization' 124.

¹²⁷ Markesinis and others, *German Law of Obligations* 415.

¹²⁸ Hannes Unberath, *Die Vertragsverletzung* (Mohr Siebeck 2007) 244-47.

¹²⁹ BGB (1900), s 285: 'The debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not responsible', Wang, *German Civil Code*, 65. The BGB of 2002 repealed ss 284, 285 and 326 and the concept of delayed performance was transferred to ss 280, 281 and 323.

¹³⁰ BGB (1900), s 284(1): 'If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning', *ibid* 64.

¹³¹ BGB (1900), s 284(2): 'If a time by the calendar is fixed for the performance, the debtor is in default without warning if he does not performance at the fixed time', translated by Wang in *ibid* 64.

¹³² Dannemann, *Introduction* 29.

¹³³ Markesinis and others, *German Law of Obligations* 414-15.

¹³⁴ BGB (1900), s 326(1): 'If, in the case of a mutual contract, one party is in default in respect of the performance due from him, the other party may allot a fixed reasonable period for performing his part with a declaration that he will decline the performance after the expiration of the period', *ibid* 73.

Nachfrist is not necessary where it is clear from nature of the contract that after a certain date the performance is of no use to the creditor (s 326(2) BGB (1900)).¹³⁵

However, among the BGB (1900) provisions which, by implication, recognise the primacy of specific performance, 'the best clue is s 241',¹³⁶ which states:

Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen. (By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance.)¹³⁷

It is apparent that this provision defines the term obligation, but on the other hand the definition is the confirmation of the primacy of specific performance. The First Commission, which included Franz Philipp von Kübel (1819-84), who was responsible for the law of contract, and the Second Commission, agreed that the creditor's right to performance was the essence of an obligation.¹³⁸ According to Florian Faust and Volker Wiese, German lawyers usually derived this principle from the Latin maxim *pacta sunt severanda*¹³⁹ and they 'would not raise the question whether specific performance should be granted in case of breach of contract, because in their understanding a claim for specific performance has been in existence since the contract was concluded, long before the breach'. Instead, 'they would rather ask whether the breach led to the loss of the claim for specific performance (for instance because performance became impossible¹⁴⁰) and, perhaps, to its replacement by a claim for 'damages in lieu of performance' (*Schadensersatz statt der Leistung*)'.¹⁴¹ In other words, the primacy of specific performance is manifested by the principle that, once a contract takes effect, the creditor has the

¹³⁵ BGB (1900), s 326(2): 'If, in consequence of the default, the performance of the contract is of no use to the other party, such party has the rights specified in para.1 without the fixing of a period being necessary', *ibid* 73.

¹³⁶ Florian Faust and Volker Wiese, 'Specific Performance: A German Perspective' in JM Smits and others (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia 2008) 50. See also Werner Lorenz, 'Reform of the German Law of Breach of Contract' (1997) 1 *Edin LR* 317, 331; Zimmermann, *Law of Obligations* 776.

¹³⁷ BGB (1900), s 241, Wang *German Civil Code* 55.

¹³⁸ Ralf Michaels, 'Systemfragen des Schuldrechts' in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB: Band II: Schuldrecht: Allgemeiner Teil 1: Teilband: §§ 241-304* (Mohr Siebeck 2007) 171. See also *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich*, vol 2 (Keip Verlag 1888) 5-6; Dawson, 'Specific Performance' 529.

¹³⁹ Faust and Wiese, 'Specific Performance' 50; Florian Faust, *Bürgerliches Gesetzbuch, Allgemeiner Teil* (Nomos 2005) 25. See also Unberath, *Die Vertragsverletzung* 242.

¹⁴⁰ See *Motive* 51; Zimmermann, *New German Law of Obligations* 43-44.

¹⁴¹ Faust and Wiese, 'Specific Performance' 50. See also Ernst A Kramer, '§241' in Helmut Heinrichs, Kurt Rebmann and Franz Jürgen Säcker (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2 (Beck Verlag 1979) 60.

right to claim performance and even in case of non-performance he retains this primary claim (*Erfüllungsanspruch* or *Primäranspruch*) until he has and chooses secondary claims (*Sekundär* – or *Schadensersatzanspruch*), namely damages in lieu of performance and rescission. The BGB (1900) provisions consistently require that, in normal circumstances, in order for the creditor to seek other remedies such as damages, he must prove that performance is impossible or that he exhausts all options that the law requires to enforce performance.¹⁴² The confirmation of this implied primacy of specific performance can be found in the statement of motive of § 241, which declares that it is the general principle that the creditor has the right to claim performance.¹⁴³

From the principle of the primacy of specific performance, it follows that regardless of the nature of the subjects of obligations, namely obligations to give, obligations to do and not to do, the creditor can claim performance. But whether the claim can be enforced by the court is another question – a question of procedural law. This is confirmed by Faust and Wiese's observation that 'German lawyers strictly distinguish between the existence of a claim which is a question of substantive law, and the enforcement of a claim, which is a question of procedural law'.¹⁴⁴ For this reason, unlike in French civil law, where the distinction between the objects of obligations is a starting point of the law of obligations and therefore a condition for the right to performance, in German civil law there is no distinction between obligations to give, obligations to do and not to do for the purpose of determining the right to performance. A statement of Zweigert and Kötz can be used to summarise the concept of specific performance in the BGB prior to the reform of the law of obligations in 2002:

In German law and in related systems it is axiomatic that a creditor has the right to bring a claim for performance of a contract and to obtain a judgment ordering the debtor to fulfill it. For this purpose it is immaterial whether the debtor's obligation is to deliver goods pursuant to a sale, to vacate dwelling house, or to produce a work of art. The view that it is of the very essence of an obligation that it be actionable in this sense is so fundamental that it is not expressly stated in any legislative text, but the words of § 241 of the Civil Code, that the creditor is entitled, on the grounds of the creditor-debtor relationship, 'to demand performance from the debtor', imply that actual performance may be demanded before a

¹⁴² Treitel, *Remedies for Breach of Contract* 48; Von Mehren and Gordley, *Civil Law System* 1121; Markesinis and others, *German Law of Obligations* 428; Coester-Waltjen, 'New Approach' 138.

¹⁴³ *Motive* 5-6.

¹⁴⁴ Faust and Wiese, 'Specific Performance' 48-49. See also Markesinis and others, *German Law of Obligations* 29-30; Repgen, '§§ 362-371' 2124, 2138; Unberath, *Die Vertragsverletzung* 241.

court and that a judgment ordering performance in kind may be issued by it.¹⁴⁵

In 2002, the BGB underwent its greatest change since it came into effect in 1900. The reform mainly concerned the law of obligations, especially provisions regarding breach of contract and remedies for breach of contract.¹⁴⁶ However, according to Dagmar Coester-Waltjen, the primacy of specific performance was not affected by this change and was 'even strengthened by the reform:¹⁴⁷ the creditor may insist on performance and may even enforce this right (except for personal services, § 888 II ZPO)'.¹⁴⁸ This firm adherence to the principle of the primacy of specific performance has distinguished the civil law of Germany from that of its French counterpart.

The research on the historical development of the German concept of specific performance above proves that it has been clear at least since the BGB came into effect in 1900 that in Germany specific performance has been the primary remedy for non-performance. However, because the primacy of specific performance was not expressly written down in any BGB provision and because this principle is abstract in nature, it may be inaccessible to those who have no knowledge of German civil law. Since the BGB (1900) was the principal model for the Thai Code of 1925, a question arises here as to whether knowledge about the German concept of specific performance was available to the draftsmen. To investigate this question, we examine the publications on German law the draftsmen of the Code of 1925 relied upon to discover how they engaged with the German concept of specific performance. The answer to this question is associated with another question as to whether the draftsmen had knowledge of the German concept of specific performance when they drafted the provisions relating to specific performance, which will be investigated thoroughly in Chapter 6.

¹⁴⁵ Zweigert and Kötz, *Introduction to Comparative Law* 472.

¹⁴⁶ Zimmermann, *New German Law of Obligations* 1; Heldrich and Rehm, 'Modernisation of the German Law of Obligations' 123. See also Lorenz, 'Reform of the German Law of Breach of Contract' 317–44; Coester-Waltjen, 'New Approach' 135–56.

¹⁴⁷ The strengthening of specific performance was a result of the adoption of the EU directive on the sale of consumer goods, Directive 1999/44/EC. For details see Zimmermann, *New German Law of Obligations* 80–81; Heldrich and Rehm, 'Modernisation of the German Law of Obligations' 124.

¹⁴⁸ Coester-Waltjen, 'New Approach' 138. However, Peter Huber, a German professor, shows that, under the BGB of 2002, specific performance is not the primary remedy for breach of sales contract. See Peter Huber, 'Der Nacherfüllungsanspruch im neuen Kaufrecht' (2002) 14 NJW 1004.

2.2 The concept of specific performance in Ernest Schuster's *The Principles of German Civil Law*

In borrowing provisions of the BGB (1900), the draftsmen of the Code of 1925 consulted three English language publications: Wang's *The German Civil Code: Translated and Annotated* (1907), Schuster's *The Principles of German Civil Law* (1907) and Rudolf Hübner's *A History of Germanic Private Law* (1918).¹⁴⁹ These three books were included in the Book of Revised Drafts' list of the abbreviations of the foreign laws and legal materials which were supposedly used as the models for Code of 1925 provisions.¹⁵⁰ In reality, however, the draftsmen copied English translations of the texts of BGB provisions only from Wang's,¹⁵¹ which does not include any annotation as its title suggests. Schuster's *The Principles of German Civil Law* is a comprehensive text on the BGB while Hübner's *A History of Germanic Private Law*, originally written in German, provides a broad historical account of German concepts of private law.¹⁵² On one occasion, the Thai draftsmen copied a text from Hübner's book to draft Article 107 on a component part of a thing,¹⁵³ but Schuster's book seems to be the main source of information about the BGB rules in the drafting of the Code of 1925.¹⁵⁴ To discover whether knowledge about the German concept of specific performance was available to the draftsmen at the time of codification, Schuster's book needs to be examined. Unlike other commentaries on the BGB which provide comments on each provision in numerical order, *The Principles of German Civil Law*, published by the Clarendon Press, deals with the BGB provisions systematically and often provides comparisons with English private law. Schuster, a doctor of law from Munich and barrister at Lincoln's Inn,¹⁵⁵ appeared to have a good knowledge of both legal systems.

¹⁴⁹ Office of the Council of State, Doc No 79, 'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925) 13.

¹⁵⁰ See ch 3, 2.2 'Materials' p 112 above.

¹⁵¹ In drafting art 210 concerning the creditor's default in the case of reciprocal obligations, the draftsmen copied part of Schuster's commentary on s 298 BGB (1900) but later gave up this original draft and decided to copy Wang's *German Civil Code* instead. See p 111 above.

¹⁵² See Rudolf Hübner, *A History of Germanic Private Law* (Francis S Philbrick tr, Rothman Reprints 1968).

¹⁵³ National Archive of Thailand, Office of the Council of State Doc No 3, Book 5(1), 'รายงานการประชุมกรรมการร่างกฎหมายวันที่ 27 กรกฎาคม พ.ศ. 2468 (Minutes of the Meetings of the Committee of Legislation)' (27 July 1925) 3-4.

¹⁵⁴ Manavarajasevi, *Interviews* 8.

¹⁵⁵ Schuster was the father of Sir George Ernest Schuster (1881-1982), a British lawyer and politician.

Schuster dealt with the concept of specific performance in Chapter 6 entitled 'Remedial Obligatory Rights'.¹⁵⁶ However, the term 'performance' was explained in his comment on s 241, which was subsumed under Chapter 1 (Nature of Obligatory Rights and Duties). He wrote:

The term *Schuldverhältniss* (obligatory relation) was substituted by the B.G.B. for the term 'obligation', formerly used in Germany...It denotes a relation between two persons which entitles one of them to claim from the other some act or omission recognized as capable of producing a legal effect – B.G.B. 241. The B.G.B. describes such an act or omission by the general term *Leistung* which in the course of this treatise will be translated by 'performance'.¹⁵⁷

Schuster did not expressly claim that s 241 BGB laid the foundation for the principle of the primacy of specific performance, but he implied so when discussing remedial obligatory rights. He submitted that there were two primary 'remedial rights' under the German law of obligations, a right to performance in case of contractual obligations and a right to restitution in kind in case of delictual obligations. He wrote:

The primary remedial right under German law is a right to performance [my emphasis] where the obligation results either from an act in law, or from surrounding circumstances, and a right to compensation (*Schadenersatz*) where the obligation results from an unlawful act.¹⁵⁸

Schuster did not draw a distinction between obligations to give, obligations to do and not to do for the purpose of determining the right to performance. Instead, he made it clear that in German law, the general rule was that '**every obligation** [my emphasis] gives rise to a claim for specific performance or restitution in kind'.¹⁵⁹ This general rule was, according to Schuster, however, subject to certain exceptions, namely on the ground of public policy where the creditor made a claim for personal services, a claim for the performance of a promise of marriage (s 1297 BGB) and a claim for the restitution of conjugal rights, in certain events where the creditor who was entitled to the performance of an agreement chose to claim rescission in lieu of performance and in the event where the right to performance or restitution in kind was transformed into a claim for pecuniary damages.¹⁶⁰ The events of this last

¹⁵⁶ Ernest J Schuster, *The Principles of German Civil Law* (Clarendon Press 1907) 184.

¹⁵⁷ *ibid* 137.

¹⁵⁸ *ibid* 184.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid* 184-85.

exception were, for example, where performance (s 280(1) BGB)¹⁶¹ or restitution in kind (s 251 BGB)¹⁶² was impossible. In the later case, the creditor could claim damages only if the impossibility was caused by a circumstance for which the debtor was responsible.¹⁶³

In affirming that specific performance was the primary remedy for non-performance and every obligation gave rise to the right to performance, Schuster's *The Principles of German Civil Law* seems to have portrayed the interpretation and understanding of the concept of specific performance in Germany broadly correctly. This is perhaps not surprising since in writing his book he consulted a number of native sources.¹⁶⁴ If Plod's claim that he and the draftsmen borrowed German rules with the assistance of this book, we can assume that they must have had sufficient knowledge of the German concept of specific performance. However, the adoption of specific performance rules in the drafting of the Code of 1925 was not as simple as this. The draftsmen did not only copy the German rules of breach of contract, but they also looked at some rules in the Minpō of 1898 in the belief that both German and Japanese rules were closely related. But was this belief correct? How similar was the Japanese concept of specific performance to the German one? These questions will be investigated in the next chapter.

CONCLUSION

Specific performance can be traced back to Roman law, but it is during the course of the development of the *ius commune* that it was conceptualised by medieval lawyers who used different methods of interpretation to produce various doctrines based on the texts of *Corpus iuris*. While the maxim *nemo potest praecise cogi ad factum* expounded by Pothier formed the basis of the rules of specific performance in the *Code civil*, the German jurists seem to have adhered to the maxim *pacta sunt servanda* to explain specific performance in the BGB. German lawyers have stood firm on the

¹⁶¹ BGB (1900), s 280(1): 'Where the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance'. Wang, *German Civil Code*, 63.

¹⁶² BGB (1900), s 251: 'In so far as restitution in kind is impossible or is insufficient to compensate the creditor, the person liable shall compensate him in money'. *ibid* 57.

¹⁶³ Schuster, *Principles* 185–86.

¹⁶⁴ In his preface, Schuster revealed a number of native sources he consulted in writing the book, namely 'Dernburg's *Bürgerliches Recht*, Planck's edition of the Civil Code and Introductory Statute, Staub's edition of the Commercial Code, Neumann's *Handausgabe* of the Civil Code and Introductory Statute'. *ibid* viii.

primacy of specific performance which requires that every obligation gives rise to claim for performance regardless of the nature of the obligation. However, the BGB does not state this principle explicitly. Its existence can be assumed from a number of BGB provisions, mainly s 241, by those who have sufficient knowledge of German civil law. The abstract nature of the German concept of specific performance raises doubts about whether the draftsmen of the Code of 1925 were aware of this complexity. Their reference to Schuster's book which they consulted in the drafting of the Code, demonstrates that information about the primacy of specific performance in German law was available to them, but it is questionable whether they read this book or understood this German principle. This will be investigated in Chapter 6. Based on Plod's perception about the relationship between the German and Japanese Civil Codes, the next chapter will demonstrate whether the German and Japanese concepts of specific performance were similar.

CHAPTER 5

THE RECEPTION OF GERMAN LAW IN JAPAN AND THE JAPANESE CONCEPT OF SPECIFIC PERFORMANCE

INTRODUCTION

It is widely held that the Japanese Civil Code ('Minpō') of 1898 was predominantly founded on German law, more specifically the two drafts of the BGB of 1900, in both structure and content. This belief was affirmed by many leading western Scholars, notably Frederic William Maitland,¹ Konrad Zweigert and Hein Kötz.² Alan Watson even went as far as to suggest that 'the first three books of the [Japanese Civil] Code are virtually a translation of the *Bürgerliches Gesetzbuch*'.³ Whether the Minpō was principally based on the BGB of 1900 is not only a question of a comparative study of German and Japanese law but is also the key to our historical and doctrinal understanding of Thailand's Civil and Commercial Code of 1925 ('Code of 1925'). This is because the reception of Japanese law in Thailand in 1925 was based on Plod's conviction, like Watson's, that the Minpō was a virtual copy of the BGB.⁴ To establish a legal system in the Code of 1925, the Thai draftsmen could copy one provision from the BGB of 1900 and another from the Minpō without concern about their theoretical conflicts because for them there were not many differences. One can assume that, if German and Japanese rules were adopted side by side in drafting the provisions concerning specific performance in the Code of 1925, this was the result of Plod's perception of the relationship between German and Japanese law. If Plod was correct, it should follow that the Japanese concept and rules of specific performance at the time of the Code of 1925 had a German flavour.

¹ Frederic William Maitland, 'The Making of the German Civil Code' in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 3 (CUP 1911) 484–85.

² K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 298.

³ Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 83.

⁴ Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982) 4, 13, 23, 42.

This chapter thus has two aims. First, it examines the adoption of foreign law in the making of the Minpō of 1898 to discover whether Plod's perception of the relationship between the BGB and the Minpō is correct. Second, it investigates more specifically whether the concept and rules of specific performance in the Minpō were German in nature. If so, one should expect to find main features of the German concept of specific performance, identified in Chapter 4 above, in Japanese law.

1. THE RECEPTION OF FOREIGN PRIVATE LAW IN JAPAN

1.1 Causes of the reception

In the process of the making of a modern state, Japan provided a great source of inspiration for Thailand. Japan exerted influence not only in the drafting of modern codes but also provided precious lessons to Thailand on how to escape from colonisation.⁵ On the surface, the situations in Japan and Thailand at the turn of the nineteenth century were similar. One of the major challenges which Japan had been facing, especially in the second half of the nineteenth century, was threats from western territorial and commercial expansion.⁶ A typical tool that western powers used to penetrate weak countries was a commercial treaty, to which a consular jurisdiction term was usually attached. In a similar manner that Thailand entered into the Bowring Treaty with Great Britain in 1855, which was the first unequal commercial treaty giving rise to extraterritoriality, Japan concluded several commercial treaties with western powers from the 1850s⁷ which led to consular jurisdiction that allowed the consular court to exercise jurisdiction over foreign subjects in both civil and criminal cases.⁸ The effect of extraterritoriality in Japan

⁵ Walter EJ Tips, *Gustave Rolin-Jaequemyns and the Making of Modern Siam: The Diaries and Letters of King Chulalongkorn's General Advisor* (White Lotus 1996) 240; Yoneo Ishii and Toshiharu Yoshigawa, *ความสัมพันธ์ไทย-ญี่ปุ่น 600 ปี* (600 Years of Thai-Japanese Relations) (Charnvit Kasetsiri and Saichon Wannarat trs, Foundations for the Promotion of the Social and Humanities Textbooks 1987) 93–94.

⁶ William Beasley, 'The Foreign Threat and the Opening of the Ports' in Marius Jansen (ed), *The Cambridge History of Japan* (CUP 2008) 259; Naoyuki Isogawa, 'The Japanese Civil Code in the World Legal Systems: Toward a Comparative Study of the Asian Civil Law' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 155.

⁷ Francis Clifford Jones, *Extraterritoriality in Japan and the Diplomatic Relations Resulting in Its Abolition, 1853-1899* (YUP 1931) 11–26.

⁸ *ibid* 27–46; Zweigert and Kötz, *Introduction to Comparative Law* 297.

was unexpected; it seemed limited in the treaty but was expansive in effect.⁹ To regain full tariff and judicial autonomy, it was necessary for Japan to establish a modern legal order.¹⁰

External pressure is crucial to the modernisation of law, but, without internal motivation, the external factor alone may not have been sufficient to bring about legal change in Japan. Despite the fact that it had a moderately developed social and economic system,¹¹ Japan lacked a comprehensive system of law and legal science in the second half of the nineteenth century.¹² A modern legal system was therefore needed to further the modernisation process.¹³ Whether the desire for law reform was triggered by the unfair treaties or self-motivated, the Charter Oath of 1868, promulgated at the enthronement of Emperor Meiji, states that:

By this oath, we set up as our aim the establishment of the national wealth on a broad basis and the framing of a constitution and laws... Evil customs of the past shall be broken off and everything based upon the just laws.¹⁴

While traditional Thai law was overwhelmingly influenced by Hindu-Buddhist moral ideologies originating from India, traditional Japanese law was a mixture of fragmented indigenous law, a product of the feudal system, and the principles of Confucianism and Buddhism imported from China.¹⁵ As in Thailand, the legal order in Japan during the pre-modern period 'had been always viewed as a quintessentially ethical order'.¹⁶ However, unlike traditional Thai law, traditional Japanese law relied to a limited degree on written statute but heavily on reason

⁹ Jones, *ibid* 27.

¹⁰ *ibid* 68; Ronald Frank, 'Civil Code' in Wilhelm Röhl (ed), *History of Law in Japan Since 1868* (Brill 2005) 169; Masaji Chiba, 'Three-Level Structure of Law in Contemporary Japan - The Shinto Society' in Masaji Chiba (ed), *Asian Indigenous Law: In Interaction with Received Law* (KPI 1986) 307–08.

¹¹ Hiroshi Oda, *Japanese Law* (3rd edn, OUP 2009) 13.

¹² Richard Minear, *Japanese Tradition and Western Law; Emperor, State, and Law in the Thought of Hozumi Yatsuka* (HUP 1970) 3; Frank, 'Civil Code' 167.

¹³ Jean-Pierre Lehmann, 'Native Custom and Legal Codification: Boissonade's Introduction of Western Law to Japan' in G Daniels (ed), *Proceedings of the British Association for Japanese Studies*, vol 4 (University of Sheffield 1979) 34; Hiromi Sasamoto-Collins, 'Progress Impeded: Constraints on Legal Equality in Post-Restoration Japan' (2008) 20 *Japan Forum* 337, 342; Chiba, 'Three-Level Structure of Law' 307–08.

¹⁴ William de Bary, Ryūsaku Tsunoda, and Donald Keene, *Sources of Japanese Tradition*, vol 2 (Columbia UP 1964) 137.

¹⁵ Yoshitaka Wada, 'The Uneven Development of Japanese Law and Dispute Resolution: Introduction to Japanese Legal History' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 95–98; Chiba, 'Three-Level Structure of Law' 304–07; Ichiro Kitamura, 'Problems of the Translation of Law in Japan' (1993) 23 *Victoria U Wellington L Rev* 143, 149. See also Yoshiyuki Noda, *Introduction to Japanese Law* (Anthony H Angelo tr, University of Tokyo Press 1976) 19–39.

¹⁶ Frank, 'Civil Code' 169. See also Lehmann, 'Native Custom' 36.

(*dōri*) and custom. Japanese statutes were not systematised and were not accessible to the public.¹⁷ One of the most important problems of the traditional Japanese legal system was therefore the lack of a general system of law applicable to the whole country.¹⁸ This provides a clue as to why the western powers viewed the Japanese legal order as inferior to their own and why consular jurisdiction was required.¹⁹ The lack of a unified system of law means the lack of a tool for effective administration, and this explains why the Japanese government, which seemed to be more interested in order than legal rules, needed a modern legal system.²⁰

1.2 Foreign influence in the making of the Minpō

The codification of civil law in Japan was part of the modernisation of the country which began from the second half of the nineteenth century as a result of the Meiji Restoration in 1868.²¹ By the time the work of codification was embarked on in the late 1870s, the Japanese had introduced a number of political and social reforms, which from the 1880s began to bear fruit. This included the enforcement of the Penal Code and the Criminal Procedure Code in 1882 and the establishment of the first constitution, which was promulgated in 1889 and came into effect in 1890, which also saw the opening of the first parliament. In 1879, Gustave Émile Boissonade (1825-1910), a French scholar, who completed the drafting of the Japanese Penal and Criminal Procedure Codes in 1880, was tasked with drafting a civil code, excluding the parts concerning family and succession law which were left to Japanese lawyers.²² Modeled on the French *Code civil*, the first civil code was promulgated in 1890 but never enforced due to disagreements between its proponents and opponents. This led to a new drafting in 1892. The new draft, which has been thought to be a product of the BGB of 1900, came into effect in 1898 and is still in use today. Over the course of codification, two major European legal systems, namely French and German law predominated. Although codification was a battlefield between two legal camps, French and English law, the supporters of English law appeared to align with the German legal system to compete with their rivals.

¹⁷ Frank, *ibid* 168.

¹⁸ Jones, *Extraterritoriality in Japan* 72–73.

¹⁹ *ibid* 71–73; Frank, 'Civil Code' 169–70.

²⁰ Wada, 'Uneven Development' 100, 102; Frank, *ibid* 170.

²¹ The Meiji Restoration was a series of events in 1868 which restored imperial rule to Japan under Emperor Meiji (1852-1912), who at his enthronement announced a plan, known as the Charter Oath, to modernise the country. For more details see Marius B Jansen, *The Making of Modern Japan* (HUP 2000).

²² Noda, *Introduction to Japanese Law* 46.

1.2.1 French influence

The nineteenth century saw the predominance of the French and British Empires in East and Southeast Asia. While British culture, especially the English language and style of education, was overwhelmingly received by the ruling classes and nobles in Thailand from the beginning of the century, continental legal systems, especially French law, seem to have been more attractive to the Japanese.²³ The Japanese government sent two students to study law in the Netherlands in the 1860s. One of them, Tsuda Masmichi (1829-1903), became a leading figure who introduced Western law to Japan, particularly by publishing the first book on Western law and inventing several important legal terms, including 'minpō' (civil law) in Japanese.²⁴ However, French law emerged as the favoured model for Japan's modernisation of civil law. There are two main reasons for this. First and foremost, the Japanese government looked for 'a rational, abstract code that was proven in practice and that was widely hailed as the greatest legal achievement of the Western world'.²⁵ This desire could undoubtedly be satisfied by the *Code civil* of 1804, which was recognised throughout nineteenth century Europe as the ideal model for codification which aimed to promote equality for all citizens of a centralised nation state.²⁶ German law was not yet codified and the English system of common law 'was far too diffuse and complicated to be understood and incorporated within a short period of time'.²⁷ Second, the French influence was reinforced by some Japanese students sent to France to study law, notably Mitsukuri Rinshō (1846-97),²⁸ French experts, most notably Boissonade, who came to Japan 1873,²⁹ and the establishment of the Law School of the Ministry of Justice in 1871 in which French law was predominantly taught.³⁰ There were also some private law schools which offered French law courses.³¹ It is noteworthy that while French law was

²³ Zweigert and Kötz, *Introduction to Comparative Law* 297.

²⁴ Lehmann, 'Native Custom' 39; Frank, 'Civil Code' 170–71; Isogawa, 'Japanese Civil Code' 153.

²⁵ Charles P Sherman, 'The Debt of Modern Japanese Law to French Law' (1918) 6 Cal LR 198, 198–99; Frank, *ibid* 172.

²⁶ Frank, *ibid*. See also Stein, *Roman Law* 123.

²⁷ Lehmann, 'Native Custom' 41. See also Sherman, 'Debt of Modern Japanese Law' 198–99.

²⁸ Frank, 'Civil Code' 171–73.

²⁹ Lehmann, 'Native Custom' 42–72; Zweigert and Kötz, *Introduction to Comparative Law* 297.

³⁰ Kichisaburo Nakamura, *The Formation of Modern Japan as Viewed from Legal History* (Centre for East Asian Cultural Studies 1962) 75; Wilhelm Röhl, 'Legal Education and Legal Profession' in Wilhelm Röhl (ed), *History of Law in Japan Since 1868* (Brill 2005) 771; Charles P Sherman, *Roman Law in the Modern World* (3rd edn, Baker 1937) 299.

³¹ Nakamura, *ibid*; Kenzo Takayanagi, 'A Century of Innovation: The Development of Japanese Law, 1868-1961' in Arthur Von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (HUP 1963) 27.

enthusiastically promoted by the Ministry of Justice,³² English law was taught in the Imperial University of Tokyo (later University of Tokyo) since 1874 as well as in other law schools. Graduates of English legal science rose to prominence as judges and senior government officials.³³

Japan's first attempt to import French civil law took place in 1870 when Rinshō Mitsukuri was assigned by the Civil Code Committee to translate the *Code civil* of 1804 speedily, but the seventy-nine article translation draft was eventually abandoned due to its incompatibility with Japanese customary and statutory law. The first complete draft of a civil code modeled on French law, harmonised with traditional Japanese law, was however made available in 1872 with the help of the Law School of the Ministry of Justice. Although it was not successful, this draft drew Japanese attention to foreign civil law.³⁴ From 1872, the codification work did not progress smoothly mainly because of changes in relevant personnel and organisations and attempts to incorporate the traditional values of Japanese society into a modern civil law.³⁵ In 1879, the project of a civil code revived after Boissonade, who made substantial contribution to the successful enactment of the Penal Code in 1880, was entrusted with it.³⁶ Boissonade was responsible for most parts of the draft except those concerning family and succession law which were prepared by Japanese draftsmen.³⁷ It is noteworthy that while Boissonade was tasked with the making of a civil code, Karl Friedrich Hermann Roesler (1834-94), a German scholar, was asked to prepare a draft of a commercial code in 1881.³⁸ The Civil Code project was completed in 1889 and the draft of the Civil Code was promulgated in 1890. By the time of its promulgation, there had already been a debate between its supporters and opponents, which eventually prevented the Minpō of 1890 from coming into effect as planned and which resulted in 'a thorough shift in the orientation of Japanese legal science'.³⁹

³² Röhl, *ibid.*

³³ Nobushige Hozumi, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (Tokyo Printing 1904) 8; Nakamura, *Formation of Modern Japan* 75.

³⁴ Frank, 'Civil Code' 173-74; Hozumi, *ibid* 6; Nakamura, *ibid* 78; Kenzo Takayanagi, 'Occidental Legal Ideas in Japan: Their Reception and Influence' (1930) 3 *Pacific Affairs* 740, 743.

³⁵ Lehmann, 'Native Custom' 55-56; Frank, *ibid* 174-75.

³⁶ Lehmann, *ibid* 56-57; Frank, *ibid* 173-76; Zweigert and Kötz, *Introduction to Comparative Law* 297; Hozumi, *New Japanese Civil Code* 6; Sherman, *Roman Law* 300; Noda, *Introduction to Japanese Law* 46; Takayanagi, 'Occidental Legal Ideas' 744.

³⁷ Noda, *ibid.*

³⁸ Harald Baum and Eiji Takahashi, 'Commercial and Corporate Law in Japan' in Wilhelm Röhl (ed), *History of Law in Japan Since 1868* (Brill 2005) 351; Nakamura, *Formation of Modern Japan* 81; Takayanagi, 'Occidental Legal Ideas' 744.

³⁹ Frank, 'Civil Code' 176. See also Nakamura, *ibid* 82-83.

Arguments against the Minpō of 1890 were related to three main issues: namely nationalistic sentiments, turf wars between proponents of English and French schools of law, and concerns about a lack of systemic coherence in the Japanese legal system and incompatibility of the French model.⁴⁰ First, critics accused the Minpō of 1890 of blindly copying Western legal concepts which could undermine Japanese moral values.⁴¹ This accusation was, however, often linked to the second reason, that is, that it was part of turf battle between supporters of rival schools.⁴² Nobushige Hozumi (1856-1926), one of the draftsmen of the Minpō of 1898, reported that:

after the arduous toil of fifteen years, Japan possessed a code of private law for the first time in her history. It was quite natural that the Code should become a topic of earnest consideration for all educated classes of people. Especially among lawyers and politicians, a violent controversy arose regarding the merits of the new Code. Those jurists, who had studied English law in the [Tokyo] University or in England or America, first raised their voices against the Code and demanded the postponement of the date of its going into operation, with a view to its complete revision. The French section of Japanese lawyers, on the other hand, supported the Code and insisted upon the necessity of its going into operation at the date originally appointed.⁴³

Several law schools operated in Japan during the 1880s and 1890s. Based on their curricula, they could roughly be divided into French-law-oriented and English-law-oriented schools.⁴⁴ These schools and their professors naturally competed against each other to promote and defend their academic systems.⁴⁵ The nature of these arguments has been questioned as to whether it was personal or academic. Hozumi claimed that the disagreement was an ideological conflict between the supporters of the School of Natural Law and the Historical School.⁴⁶ After the abolition of the Law School of the Ministry of Justice, where French law was predominantly taught in French, in 1885 the Law School transferred to the newly established French law sections at the Law Faculty of the University of Tokyo. English law had been taught

⁴⁰ Nakamura, *ibid* 83; Frank, *ibid* 177.

⁴¹ Byron Marshall, 'Professors and Politics: The Meiji Academic Elite' (1977) 3 JJS 71, 83; Zweigert and Kötz, *Introduction to Comparative Law* 297; Frank *ibid* 177, 179; Noda, *Introduction to Japanese Law* 47; Takayanagi, 'Occidental Legal Ideas' 745; Isogawa, 'Japanese Civil Code' 156.

⁴² Noda, *ibid* 48; Takayanagi, *ibid* 746.

⁴³ Hozumi, *New Japanese Civil Code* 7–8.

⁴⁴ Kenzo Takayanagi, 'Contact of the Common Law with the Civil Law in Japan' (1955) 4 AJCL 60, 60; Takayanagi, 'Occidental Legal Ideas' 743.

⁴⁵ John Owen Haley, *Authority without Power: Law and the Japanese Paradox* (OUP 1991) 76; Marshall, 'Professors and Politics' 82–84; Nakamura, *Formation of Modern Japan* 75.

⁴⁶ Hozumi, *New Japanese Civil Code* 7–8.

there since 1874.⁴⁷ The Tokyo Law Faculty therefore accommodated two competing English and French factions. A German section was added to the Law Faculty in 1887 and enjoyed increasing popularity.⁴⁸ The campaign against the Minpō of 1890 was led by professors in the English section of the University of Tokyo Faculty of Law, notably Hozumi, and supported by a number of law students.⁴⁹ Hozumi compared the disagreement between the supporters and opponents, including himself, of the Minpō of 1890 to the controversy over codification between Thibaut and Savigny, but it can be viewed as merely a turf war between two rival camps.⁵⁰

Despite the fact that debates between supporters of different schools brought delay and uncertainty to the modernisation of civil law in Japan and regardless of the reasons behind the opposition, arguments over the Minpō of 1890 can be seen as part of the rationalisation of Japanese civil law in the sense that the issue of the reception of civil law in Japan had been discussed critically among educated classes, eg academics, judges and private lawyers.⁵¹ By contrast, Thailand, before 1917, had no higher education institutions. Only children of the royal and other noble families could afford a bachelor degree abroad, mainly in England. The Law School of the Ministry of Justice was established in 1897 under the overwhelming influence of English common law prompting a prominent French legal adviser, Georges Padoux, urged in 1913 the Thai government to reform legal education to facilitate the country's newly-established legal system based on civil law. The Thai government needed to reorganise and diversify legal education following the Japanese model.⁵² The intellectual climates prior to codification of civil law in Thailand and Japan were therefore different.

The Minpō of 1890 was fiercely criticized for lacking systemic coherence.⁵³ While the Japanese Civil Code was drafted under French influence, Japan's Code of Civil Procedure, which was promulgated in 1890 and came into effect in 1891, and its Commercial Code were drafted by German lawyers. The application of these three codes would cause practical difficulties.⁵⁴ The content of the Minpō of 1890 was also criticised. Despite being educated in France, Masaaki Tomii (1858-1935),

⁴⁷ *ibid* 8; Marshall, 'Professors and Politics' 61; Takayanagi, 'Century of Innovation' 28; Oda, *Japanese Law* 19; Isogawa, 'Japanese Civil Code' 157.

⁴⁸ Takayanagi, *ibid* 30.

⁴⁹ Marshall, 'Professors and Politics' 83.

⁵⁰ Takayanagi, 'Contact of the Common Law' 62.

⁵¹ Hozumi, *New Japanese Civil Code* 7; Takayanagi, 'Century of Innovation' 27; Marshall, 'Professors and Politics' 83.

⁵² G Padoux, *Report on the Proposed Penal Code for the Kingdom of Siam Submitted to His Royal Highness Prince Rajburi Direckrit, Minister of Justice* (Ministry of Justice 1906) 149.

⁵³ Frank, 'Civil Code' 178.

⁵⁴ *ibid*; Nakamura, *Formation of Modern Japan* 83.

one of the draftsmen of the Minpō of 1898, was critical of the Minpō of 1890. Tomii observed that there were a number of imitations and contradictions, and that many provisions were in fact of procedural or public law nature.⁵⁵ Hozumi, educated in three different countries, England, France and Germany and the author of the article ‘Comparative Analysis of English, French and German Legal Theory’ (*Ei-futsu-doku hōgaku hikakuron*) published in 1887, also criticised the Minpō of 1890 for its inconsistency, structural problems and defects.⁵⁶ This technical problem was similarly experienced in Thailand after the promulgation of the Thai Code of 1923 modeled on French law. This Thai Code never came into effect because of heavy criticism from some judges, lawyers and senior government officials who found it incoherent and incomprehensible.

1.2.2 German influence

The opponents of the Minpō of 1890, mainly from the English faction, prevailed as in 1892 the Japanese parliament passed a bill to postpone the operation of the Code until 31 December 1896. Upon the postponement of the Code, a Codification Committee, consisting of members of both Houses of the Diet, University of Tokyo professors, judges, eminent lawyers and representatives of private sectors under the chairmanship of the Prime Minister, was established. Three law professors of the Imperial University of Tokyo Faculty of Law, Kenjirō Ume (1860-1910), Hozumi and Tomii, were appointed as a special committee to prepare a new draft.⁵⁷ While none of the draftsmen of the Thai Code of 1925 was formally educated in a German law school, two Japanese draftsmen were students of German law. Ume, a former leader of the proponents of the Code of 1890, studied law in both German and French universities. Despite holding a doctorate in law from France, Tomii was a fierce critic of French law. Hozumi, who studied law in England, France and Germany, championed German law. He praised German law as being the most advanced jurisprudence in the world and the BGB for being superior to the French *Code civil*.⁵⁸

⁵⁵ Frank, *ibid* 179–80; Ryōsuke Ishii, *Japanese Legislation in the Meiji Era* (William Chambliss tr, Pan-Pacific Press 1958) 588.

⁵⁶ Frank, *ibid* 180.

⁵⁷ Hozumi, *New Japanese Civil Code* 9; Takayanagi, ‘Century of Innovation’ 30.

⁵⁸ Nobushige Hozhumi, ‘Doitsugaku no Nippon ni Oyoboseru Eikyō’ quoted in Yoshiyuki Noda, ‘Nihon ni okeru hikakuho no hatten to genjō’ in Hideo Tanaka (ed), *The Japanese Legal System : Introductory Cases and Materials* (University of Tokyo Press 1976) 204; Noda, *Introduction to Japanese Law* 52.

In Thailand, after the failure of the Code of 1923, German law suddenly gained prominence. By contrast, Japan had been familiar with German jurisprudence for several years before it became the basis of the new Japanese Civil Code. Roesler, a German professor, was appointed by the Japanese government as a legal adviser in 1870s. He had been a leading figure in the drafting of the Meiji Constitution and the Commercial Code. Moreover, the Code of Civil Procedure, which came into force in 1891, was almost a literal translation of the German Civil Procedure Code.⁵⁹ In terms of legal education, German jurisprudence began to be recognised formally when the German Section was established at the Faculty of Law of the University of Tokyo in 1887.⁶⁰

The three draftsmen of the new Code divided the drafting work and 'all the topics of the code were shared among them, each choosing topics in which he believed himself most knowledgeable'.⁶¹ Hozumi revealed that the new Minpō kept a balance between major legal systems. He wrote:

The Constitution of the Committee, especially that of the Drafting Committee made it clear, that they could not agree to take the law of any one country as an exclusive model upon which to frame the new Code.⁶²

Learning the lesson from the making of the Minpō of 1890, which relied heavily on French law, the draftsmen agreed to collect the codes, statutes and judicial reports from all 'civilised' jurisdictions. The materials were written in a variety of languages including English, French, German and Italian. International treaties relating to private law were also considered. The Drafting Committee was able to collect more than thirty civil codes, including several drafts, such as the first and second drafts of the BGB, the Belgian Civil Code and even the draft of the Civil Code of New York.⁶³ Huzumi claimed that the new Minpō was a product of comparative law since:

The method of preparing the draft gave a characteristic feature to the new Code. The Japanese Civil Code may be said to be a fruit of comparative jurisprudence. At first sight, it may appear that the new code was very closely modeled upon the new German Civil Code; and I have very often read statements to that effect. It is true that the first and second draft of the German Code furnished very valuable material to the drafting committee and had a great influence upon the deliberations of the Committee. But, on

⁵⁹ Takayanagi, 'Century of Innovation' 31–32; Zweigert and Kötz, *Introduction to Comparative Law* 298; Frank, 'Civil Code' 182.

⁶⁰ Takayanagi, *ibid* 30.

⁶¹ Noda, *Introduction to Japanese Law* 50–51.

⁶² Hozumi, *New Japanese Civil Code* 10.

⁶³ *ibid*.

close examination of the principles and rules adopted in the Code, it will appear that they gathered materials from all parts of the civilized world and freely adopted rules or principles from the laws of any country, whenever they saw the advantage of doing so. In some parts, rules were adopted from the French Civil Code; in others, the principles of English common law were followed; in others again, such laws as the Swiss Federal Code of Obligations of 1881, the new Spanish Civil Code of 1889, the Property Code of Montenegro, Indian Succession and Contract Acts or the Civil Codes of Louisiana, Lower Canada or South American Republics or the draft Civil Code of New York, and the like have given materials for the framers of the Code.⁶⁴

The Drafts of Book I (General Provisions), Book II (Rights *in rem*) and Book III (Rights *in personam*), were approved by the Japanese parliament in 1896 with some trivial modifications. The last two Books, Book IV on Family and Book V on Succession, were adopted by the parliament in 1898.⁶⁵ The whole Civil Code came into effect in July 1898. Despite the fact that it still largely contains foreign legal elements just as the old one did, following its promulgation, the new Minpō did not attract strong criticism from the public.⁶⁶ Considering the division of six Books of the new Code alone, it is easy to conclude that the draftsmen preferred the BGB to the *Code civil*, but one may wonder why the victory of the English camp led to the adoption of German law. A simple answer may be that the opponents of the Minpō of 1890 rejected French law's domination over codification of civil law and the only alternative was German law. This can also be seen as a compromise introduced because of the conflict between the French and English camps.⁶⁷

The general structure of Minpō follows the Pandectist system, but a perennial question remains as to whether Japanese civil law belongs to the German or French legal families and this has attracted a great deal of interest from comparative lawyers.⁶⁸ Zweigert and Kötz contends that the Minpō of 1898 'showed sporadic influences of French law and Common Law here and there but followed the two drafts of the German BGB in important points of structure and content'.⁶⁹ Alan Watson even claimed that the first three books of the Minpō were almost a copy of the BGB.⁷⁰ The Code in fact follows the structure and many provisions of the drafts of the BGB but borrows much of its French content from both the *Code civil* of 1804

⁶⁴ *ibid* 11.

⁶⁵ *ibid*.

⁶⁶ Frank, 'Civil Code' 187.

⁶⁷ Charles R Stevens, 'Modern Japanese Law as an Instrument of Comparison' (1971) 19 *AJCL* 665, 666.

⁶⁸ See Isogawa, 'Japanese Civil Code' 158.

⁶⁹ Zweigert and Kötz, *Introduction to Comparative Law* 298.

⁷⁰ Watson, 'Legal Transplants and Law Reform' 83.

and the Minpō of 1890 drafted by Boissonade.⁷¹ Charles Sherman observed that ‘about one-half of the provisions of the Japanese code are derived from the French either directly or through the intermediary code of Boissonade’.⁷² The French influence over the Minpō of 1898 was confirmed by Ume, the chief draftsman, who remarked in 1904:

The code that replaces it and that resembles the German Civil Code in form has often wrongly been believed to follow exclusively the pattern of the German code. In truth, however, it does not. The new [Japanese] code is based on the French code and other codes of French origin at least as much as it is on the German code.⁷³

Why was the influence of French civil law in the Minpō of 1898 downplayed for so long despite this confirmation? Zentarō Kitagawa⁷⁴ may well have answered this question by pointing out that ‘the legal concepts, Institutions (*hōseido*) and Conceptual Systems (*hōtaikei*) which we know today as Japanese civil law science were built through overwhelming reliance on German civil law science’⁷⁵ and by Kenzo Takayanagi, an eminent scholar at Tokyo University, who observed that ‘one of the most striking phenomena of [the development of Japanese civil law between 1900 and 1913] was the dominance of German legal science in Japan’.⁷⁶ After the new Minpō of Japan came into force in 1898, English, French and German law continued to be taught at the University of Tokyo, but it was obvious that the Japanese were turning their attention to German legal science.⁷⁷ Thanks to Ume’s civil-law commentary which was significantly based on French jurisprudence, the influence of French law survived for a short period after the enforcement of the new Civil Code. Following his death in 1910, Ume’s interpretation of the Minpō of 1980

⁷¹ Noda, *Introduction of Japanese Law* 51; Sherman, ‘Debt of Modern Japanese Law’ 201; Oda, *Japanese Law* 115–16; Frank, ‘Civil Code’ 187–88.

⁷² Sherman, *Roman Law* 301.

⁷³ Kenjiro Ume’s Speech at French Civil Code Centenary Celebrations in 1904 at the Faculty of Law of the Imperial University of Tokyo quoted in Noda, *Introduction to Japanese Law* 52.

⁷⁴ Zentarō Kitagawa, an emeritus professor of law at Kyoto University, whose work on the reception of German law in Japan (*Rezeption und Fortbildung des europäischen Zivilrecht in Japan*) in 1970 has shed new light on understanding the reception phenomenon and attracted academic attention on the subject. See John O Haley, ‘The Revival of German Scholarship on Japanese Law’ (1982) 30 *AJCL* 335, 336.

⁷⁵ Zentarō Kitagawa, ‘Theory Reception - One Aspect of The Development of Japanese Civil Law Science’ in Kōichirō Fujikura (ed), *Japanese Law and Legal Theory* (New York UP 1996) 3.

⁷⁶ Takayanagi, ‘Occidental Legal Ideas’ 747.

⁷⁷ *ibid* 747–48; Zentarō Kitagawa, ‘Japanese Civil Law and German Law - From the Viewpoint of Comparative Law’ in Kitagawa Z and Riesenhuber K (eds), *The Identity of German and Japanese Civil Law in Comparative Perspectives* (De Gruyter Recht 2007) 30; Takayanagi, ‘Century of Innovation’ 34–35; Shusei Ono, ‘Comparative Law and the Civil Code of Japan (2)’ (1996) 25 *Hitotsubashi Journal of Law and Politics* 29, 47.

in the French manner was completely forgotten.⁷⁸ There emerged a common belief in the legal community in Japan that the Minpō of 1898 was a product of German law as Hiroshi Oda observes:

Because of the belief that the new Code was based on German Law, Japanese scholars and lawyers have worked hard to digest German civil law theories. The most common destination of Japanese academics studying abroad was Germany, especially before the Second World War.⁷⁹

To summarise German law's influence in the Japanese system of private law between the enforcement of the Minpō of 1898 and the Second World War,⁸⁰ we may borrow a statement of Kitagawa, an eminent expert on this subject, who wrote:

Generally, reception of foreign law may be divided into two processes: the process of reception of foreign law(s) and the process of assimilation of such law(s). Between these two processes, historical significance and [the] role of the reception of German legal theory lies in the assimilation process which occurred subsequent to the enactment of the Japanese Civil Code. This assimilation process can be regarded as a process for developing Japan's domestic civil law system by casting the product of the mixed-type reception of foreign codes (ie Japanese Civil Code) into a mould imported from a foreign country (ie German jurisprudence). In other words, by grafting the German legal system onto the product of a mixed type reception foreign codes, the Japanese civil law system had developed its unique two-tiered structure. This is the prototype of Japanese civil law jurisprudence from the viewpoint of comparative law and, in this sense, Japanese civil law can be regard as a system homogenous to German civil law. In this, German jurisprudence attained its unique position as a homogenous foreign system that had directly contributed to development of de lege lata analysis of the Japanese Civil Code, in addition to its role in comparative study of law.⁸¹

1.2.3 The tracing of De Becker's *Annotated Civil Code of Japan* and examining of Plod's perception of the reception of German law in Japan

Kitagawa's research on the reception of German law in Japan had a profound impact on the traditional perception of German influence in Japanese civil law.⁸² German law exerted less influence in the drafting of the Minpō of 1898 than many

⁷⁸ Ono, *ibid* 47.

⁷⁹ Oda, *Japanese Law* 115. See also Takayanagi, 'Century of Innovation' 34–35; Stevens 'Modern Japanese Law' 666.

⁸⁰ Takayanagi observed that 'during the period of the Allied occupation of Japan between 1945-1951, there was an unprecedented inflow of American laws and institutions'.

Takayanagi, 'Contact of the Common Law' 64.

⁸¹ Kitagawa, 'Japanese Civil Law' 33–34.

⁸² See Haley, 'Revival of German Scholarship' 336.

have believed, but it was, in fact, overwhelmingly influential in the application and interpretation of the Code. The reception of German law in Japan was concentrated more on the process of interpreting legal concepts and institutions of the Minpō in 1898 than on the process of drafting the Code. Kitagawa is not the first person who discovered the myth of this Japanese reception. It appears that Japanese scholars were alerted to the complexity of the reception of foreign law in Japan since Eiichi Hoshino published a paper whose title can be translated as 'Influence of French Civil Law on the Japanese Civil Code' in 1965.⁸³ This publication dramatically changed Japanese legal scholars' perception of the relationship between Japanese and French civil law since 'before then, the study of civil law in Japan generally had little relevance with French law'.⁸⁴ Hoshino's work might also have inspired Kitagawa to conduct extensive research on the reception of German law in Japan.

Based on the new conception of the reception of German law in Japan, it is reasonable to assume that De Becker's *Annotated Civil Code of Japan*, published in 1909, was a product of the 'germanisation' of Japanese civil law. In Volume I's Preface, De Becker revealed the native principal source of his book saying that:

I desire to acknowledge with grateful thanks the kind and generous permission of **Mr. Tomioka (Kaji) Yasuro** to adopt, practically intact, that gentlemen's '**Gembun-Itchi Mimpō-Seigi**' [my emphasis] as a basis and framework for this book. I am also infinitely indebted to Mr. Nagahara Eiichi for most valuable assistance given to me by him in the preparation of the work.⁸⁵

Written in Japanese, Yasuro Tomioka's *Gembun-Itchi Mimpō-Seigi*, which is translated as 'A Colloquial-style Commentary on the Civil Code', is a five-volume commentary on the Minpō of 1898 published in 1903. When comparing De Becker's commentaries on Articles 412 to 416 with those of Tomioka's book as examples,⁸⁶ it is found that the referencing to BGB provisions in the *Annotated Civil Code of Japan* does not come from *Gembun-Itchi Mimpō-Seigi*. Hiromi Sasamoto-Collins confirmed that:

⁸³ See E Hoshino, *Minpō ronshū* (Collection of Theories on Civil Law), vol 1 (Yūhikaku 1970).

⁸⁴ Taro Kogayu, 'French Law Research in the Study of Civil Law in Japan' in Zentarō Kitagawa and Karl Riesenhuber (eds), *The Identity of German and Japanese Civil Law in Comparative Perspectives* (De Gruyter Recht 2007) 92.

⁸⁵ JE de Becker, *Annotated Civil Code of Japan*, vol 1 (Butterworth 1909) VI.

⁸⁶ This research was conducted with the help of Hiromi Sasamoto-Collins, Lecturer in Japanese Studies at the University of Edinburgh.

[*Annotated Civil Code of Japan*]'s style, content, and format, such as the translation of the articles itself, references, Meanings of Words, and Explanation (in this order) conform to [Tomioka]'s book...But [Tomioka]'s book, as far as Arts 412-6 are concerned, does not include German references. For instance, the references for Art 412 in [De Becker]'s book are 'Arts. 415, 541 and 542 [of the Japanese Civil Code]; also Art 284 of the German Civil Code'. In [Tomioka]'s book, however, the equivalent passage is 'Arts 415, 541 and 542 [of the Japanese Civil Code]' but does not include 'Art 284 of the German Civil Code'.⁸⁷

Although De Becker's adherence to the BGB was not inspired by the native source, one cannot assume that his referencing was original work by him. The minutes of the meetings of the Japanese drafting committee and the apparent characters of the Japanese provisions merit exploration. This research therefore examines the stenographic minutes of the meeting of the Commission for Inquiry into Codification (法典調査会民法議事速記録 第十八卷) in relation to Articles 414 and 415. These two provisions are the most important rules concerning the concept of specific performance in the Minpō; Article 414 established the creditor's rights to specific performance while Article 415 deals with damages. These were used as the models for drafting Articles 213 and 215 of the Thai Code of 1925 respectively. Hozumi, the draftsman responsible for the preparation of the drafts, informed the Commission, which was tasked with the examination of the drafts, of statutes and literatures about what he had consulted in drafting Articles 414 and 415 concerning specific performance and damages. According to Hozumi, the model provisions of Article 414 (Article 408 at the time of drafting) included:

Article 382 of the old Japanese Civil Code of 1890 [drafted by Boissonade]; Articles 1143, 1144 of the French *Code civil*, Section 1323 of the Austrian Civil Code [*Allgemeines bürgerliches Gesetzbuch*] of 1811, Article 1267 of the Dutch Civil Code [*Burgerlijk Wetboek*] of 1838,⁸⁸ Articles 1220 and 1222 of the Italian Civil Code of 1865,⁸⁹ Sections 111 and 112 of the Swiss Code of Obligations of 1881, Articles 540, 542, 1098 and 1099 of the General Property Code of Montenegro of 1888, **Section 219 of the First Draft of the BGB, Section 213 of the Second Draft of the BGB**, [my emphasis] Sections 79 and 80 of Chapter 6, Part 1 of the General National Law for the Prussian States [*Allgemeines Landrecht für die preußischen Staaten*], Section 687 of the

⁸⁷ Email from Hiromi Sasamoto-Collins to author (18 January 2013).

⁸⁸ The *Burgerlijk Wetboek* of 1838 was considerably influenced by the *Code civil*. See Harry Dondorp and Hylkje de Jong, 'Coercive Measures to Enforce Obligations under Dutch Law (1838-1933)' in Jan Hallebeek and Harry Dondorp (eds), *Right to Specific Performance: The Historical Development* (Intersentia 2010) 138.

⁸⁹ The Italian Civil Code of 1865 was mainly based on the *Code civil*. See PG Monateri, 'The Weak Law: Contaminations and Legal Cultures' (2003) 13 *Transnat'l L & Contemp Probs* 575, 584-88.

The list of statutes which Hozumi consulted in drafting Article 415 (Article 409 at the time of drafting) included:

Articles 381, 383 and 384 of the old Japanese Civil Code of 1890; Articles 1143 and 1146 to 1148 of the French *Code civil*, Section 1295 and 1306 of the Austrian Civil Code of 1811, Article 1275, 1280 and 1281 of the Dutch Civil Code of 1838, Articles 1218, 1225 and 1226 of the Italian Civil Code of 1865, Sections 110 of the Swiss Code of Obligations of 1881, Articles 540 and 541 of the General Property Code of Montenegro of 1888, Article 1105 of the Spanish Civil Code of 1889, **Sections 219 and 247 of the First Draft of the BGB, Sections 213 and 242 of the Second Draft of the BGB**, Sections 285 and 291 of Chapter 5, Part 1 of the General National Law for the Prussian States, Section 687 of the Civil Code of Saxony of 1865, Article 109 of Chapter 1, Part 2 of Paris draft, and Articles 1065, 1071 and 1072 of the Civil Code of Lower Canada of 1866.⁹¹ [My emphasis]

Hozumi gave the draft examiners only papers containing the list of sources that he claimed to consult, but he neither told the meeting which provisions were adopted as the principal models nor did they specifically discuss the sources.⁹² Among the foreign provisions in the list of Article 414 above, there appear two provisions from the two drafts of the BGB: s 219 of the First Draft, which developed into s 213 of the Second Draft. S 213 was eventually separated into three provisions, ss 249, 250 and 251 of the BGB, which came into effect in 1900.⁹³ For the list of sources of Article 415, Hozumi mentioned ss 219 and 247 of the First Draft and ss 213 and 242 of the Second Draft of the BGB. S 247 was the predecessor of s 242, which became s 286 of the BGB of 1900.⁹⁴ Based on these findings, in linking the Japanese Article 414 with ss 249 and 251 BGB and Article 415 with ss 249, 251 and 286 BGB in his *Annotated Civil Code of Japan* volume 2, De Becker was, at least, partially right. The question,

⁹⁰ ‘法典調査会民法議事速記録 第十八卷 (Stenographic Minutes of the Proceedings on Civil Code in the Commission for Inquiry into Codification)’, vol 18, pages 33-42, 34 < http://dl.ndl.go.jp/view/pdf/digidepo_1367545.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=35-44 and > accessed 8 February 2013 translated by Hiromi Sasamoto-Collins in email from Sasamoto-Collins to author (10 February 2013).

⁹¹ ‘Stenographic Minutes’, vol 18, pages 49-51, 50 < http://dl.ndl.go.jp/view/pdf/digidepo_1367545.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=51-53 > accessed 14 February 2013 translated by Wei-sheng Hong in email from Hong to author (14 February 2013).

⁹² See ‘Stenographic Minutes’, vol 18, 34.

⁹³ See Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich*, vol 2 (Keip 2005) III; Horst Heinrich Jakobs and Werner Schubert, *Die Beratung des Bürgerlichen Gesetzbuchs: in systematischer Zusammenstellung der unveröffentlichten Quellen (§§ 241 bis 432)* (de Gruyter 1978) 101-02.

⁹⁴ See Mugdan, *ibid* X; Jakobs and Schubert, *ibid* 306.

however, remains as to why he mentioned only these BGB provisions while according to the minutes of the meetings above, the draftsman clearly referred to various foreign rules. De Becker did not even mention Article 382 of the old Minpō of 1890, which Hozumi claimed to use as one of the models for current Article 414. Examining every provision from Articles 399 to 724 in his second volume, where there are references, the only foreign law to which De Becker referred is the BGB.⁹⁵ Without a need to examine the minutes of the meeting of the Japanese draftsmen on every Japanese provision, we can confidently conclude that the information about his referencing to the BGB in the second volume of De Becker's *Annotated Civil Code of Japan* is misleading.

If this conclusion is correct, it follows that Plod's belief that De Becker's referencing was authentic in that it revealed the Japanese draftsmen's foreign sources used as the model of the Japanese provisions and that the Minpō was a virtual copy of the BGB was incorrect.⁹⁶ Since German law was the only foreign law referred to in the second volume of De Becker's *Annotated Civil Code of Japan*, we can now discover the underlying reason why Plod thought that the Japanese simply copied the BGB when making the Minpō. Furthermore, Plod erroneously believed that De Becker's referencing authentically represented the Japanese draftsmen's: he did not check their official documents, ie the minutes of the meeting. Had he done so, he would have found that the BGB was one among many foreign statutes that Hozumi claimed to consult. Although his list of sources presented to the draft examiners shows that the Japanese Article 414 was based on various statutes and doctrines, one cannot be sure that Hozumi really incorporated all of them in the drafting of Articles 414 and 415 unless one examines the text of the provisions.

2. THE CONCEPT OF SPECIFIC PERFORMANCE IN THE MINPŌ

2.1 An anatomy of Articles 414 and 415 of the Minpō of 1898

To discover which foreign law influenced a Japanese provision of the Minpō by examining official documents of the Japanese draftsmen and examiners, one needs to bear in mind that during the period of codification, there was a certain amount of

⁹⁵ JE de Becker, *Annotated Civil Code of Japan*, vol 2 (Butterworth 1909) 6–285.

⁹⁶ See Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1982) 9, 23.

antipathy between supporters of the English and French schools of law in Japan. Even among the three draftsmen, there were representatives of both factions with Hozumi from the English camp and Ume from the French camp. Furthermore, unlike in Thailand, where the Code of 1925 was drafted by a committee appointed by an absolute monarch and linguistically examined by a committee comprised of senior ministers, thereby limiting the people involved in making the Code, in democratising Japan, a variety of groups examined the drafts of the Minpō. One can reasonably speculate that Hozumi's claim that he consulted a wide range of statutes and publications was his tactful strategy for not showing any favouritism toward a particular legal system while in fact he did not really use all the sources he mentioned. Thus to discover whether Japanese provisions have German elements, one needs to examine what the draftsmen and the examiners discussed in relation to the rules of specific performance.

At a meeting of the Commission for Inquiry, Hozumi was asked why the first paragraph of Article 414 (See Article 414 in Table 5-1 below), whose provision number was 408 at the time, was needed. Hozumi reasoned that, although some people may have thought that in case of non-performance, performance could be enforced without any express provision, the creditor's right to compulsory performance should be confirmed in writing. If there was no such legal provision, Hozumi thought that while the creditor could claim compensation for damages it was unclear whether he could enforce performance.⁹⁷ Ume, the chief draftsman, who also attended the meeting, defended Hozumi's draft of Article 414 by arguing that the provision was needed to affirm that damages was also a remedy for non-performance and that the notion that compulsory performance was the only remedy for non-performance was wrong.⁹⁸ In his *Minpō Yōgi* (A Basic Commentary on the Civil Code), Ume maintained that Articles 414 and 415 were not the full adoption of either the principle of specific performance or the principle of damages, but they were rather a combination of these two principles. Ume explained that, if the latter principle was fully adopted, Article 414 would not have provided other means of enforcement, for example the creditor's right to hire a third person to perform the obligation at the expense of the debtor.⁹⁹

Based on the minutes of the meeting and the commentary above, it can be observed that both Hozumi and Ume recognised both specific performance and

⁹⁷ 'Stenographic Minutes', vol 18, 39.

⁹⁸ *ibid* 46.

⁹⁹ Kenjiro Ume, *Minpō Yōgi* (A Basic Commentary on the Civil Code), vol 3 (Yūhikaku 1984) 51. However, the drafts of arts 414 and 415 were prepared by Hozumi, not Ume. See Tamura, 'Modernization Process in Japan' 39-41.

damages as primary remedies for non-performance. However, one cannot be certain which foreign rules were actually used as the models for Articles 414 and 415 since neither the draftsmen nor the examiners discussed foreign provisions which Hozumi claimed to consult specifically. This shows the differences between the Japanese and Thai codification processes. The former appeared to focus on the question 'why was each rule adopted?' while the latter on 'which foreign law should be copied?'. To identify the underlying foreign principles behind the Japanese provisions, one needs to examine their text thoroughly.

A brief glance at Articles 414 and 415 gives an impression that the Japanese draftsmen relied on the text of Articles 382 and 383 of the Old Japanese Civil Code (the Minpō of 1890),¹⁰⁰ which were drafted in French by Boissonade, who did not reveal the foreign models of these provisions. Linguistically, the text of Article 414 appeared to be based on the text of Article 382 while the text of Article 415 agrees with the text of Article 383 in part as illustrated in the following comparison.

¹⁰⁰ See the discussions of the Japanese draftsmen in Japanese language on art 414 at http://dl.ndl.go.jp/view/pdf/digidepo_1367545.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=35-44 and http://dl.ndl.go.jp/view/pdf/digidepo_1367545.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=45-51 and Article 415 at http://dl.ndl.go.jp/view/pdf/digidepo_1367545.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=51-53 and http://dl.ndl.go.jp/view/pdf/digidepo_1367550.pdf?pdfOutputRangeType=R&pdfPageSize=&pdfOutputRanges=180-185.

Article 382 of the Minpō of 1890	Article 414 of the Minpō of 1898
<p>If the creditor claims for the direct performance of the obligation in accordance with its form and true meaning, then the court has to order it insofar as the direct performance is possible without to [depriving] the debtor of any physical freedom.</p> <p>If the purpose of the obligation is some physical things among the property of the debtor under his power, then the court has to attach them by virtue of its authority and to hand them over to the creditor.</p> <p>If the purpose of the obligation consists in [a] certain action, then the court has to allow the creditor to hire a third person for this action at the expense of the creditor.</p> <p>If the purpose of the obligation consists in [a] certain inaction, then the court has to allow the creditor to remove the outcome of the unjustified action performed by the debtor at [the] expense of the debtor and to take suitable measures to prevent possible breach of the obligation in the future.</p> <p>Even in cases of Paragraph 1 to 4, the creditor may still demand compensation for damage.</p> <p>The procedure of enforcement against the debtor has to be provided in the Law of Civil Procedure.¹⁰¹</p>	<p>When a debtor does not voluntarily perform the obligation, the creditor may make a demand for compulsory performance to the Court, unless the nature of the obligation does not permit it.</p> <p>When the nature of the obligation does not permit of compulsory performance of an act for its subject, the creditor may demand the Court to cause a third person to do the same at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.</p> <p>With regard to an obligation which has a forbearance for its subject the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.</p> <p>The provisions of the preceding three Paragraphs do not affect a demand for compensation for damages.¹⁰²</p>

Table 5 - 1: Comparisons between the texts of the rules concerning specific performance in the Minpōs of 1890 and 1898

¹⁰¹ Japanese Civil Code of 1890, art 382 tr by Shiori Tamura in email from Tamura to author (21 May 2012). The original French texts of art 382 is available at http://jalii.law.nagoyau.ac.jp/civil_code/pdf/codeciviljapon1890.expose_01/01.biens/01.biens_02/codeciviljapon1890.expose_01_00040.b.01150.01020000_a.10000400.pdf.

¹⁰² Japanese Civil Code of 1898, art 414 in De Becker, *Annotated Civil Code of Japan*, vol 2, 22.

Article 383 of the Minpō of 1890	Article 415 of the Minpō of 1898
<p>In cases where the debtor refuses to effect performance, the creditor may demand compensation for damage if he fails to claim for enforcement, or if the performance cannot be enforced due to its nature; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.</p> <p>The creditor may demand compensation for damage also in case of simple delay.</p> <p>The amount of compensation should be, so long as the parties have reached no agreement on it, determined by the court according to the distinctions and conditions provided in the following articles unless a certain amount of compensation is prescribed by law.¹⁰³</p>	<p>When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor.¹⁰⁴</p>

Table 5 - 2: Comparisons between the texts of the rules concerning damages in the Minpōs of 1890 and 1898

It is worth repeating that in his *Annotated Civil Code of Japan*, De Becker linked Article 414 to Article 415 of the same Code, Articles 73 to 76 of the Japanese Code of Civil Procedure, and ss 249 and 251 of the BGB,¹⁰⁵ and he linked Article 415 to Article 414 of the same Code and ss 250, 286 and 325 of the BGB.¹⁰⁶ The BGB is the only foreign law to which De Becker referred; he mentioned none of provisions of the French *Code civil*. However, having considered the texts of both Articles 414 and 415, at least three noticeable features stand out. First, Article 414 appears to be a procedural rather than a substantive rule. It prescribes methods for enforcing performance where the debtor does not perform his obligation. This feature certainly does not derive from the BGB, which deals with only the substantive

¹⁰³ Japanese Civil Code of 1890, art 383 tr by Shiori Tamura in 'Modernization Process in Japan (3)' 39 < http://www.openlegaltextbook.info/LA275/data/uploads/main-text/23_part2-modernization-obligation.pdf> accessed 17 January 2013. The original French texts of art 383 is available at http://jalii.law.nagoyau.ac.jp/civil_code/pdf/codeciviljapon1890.expose_01/01.biens/01.biens_02/codeciviljapon1890.expose_01_00040.b.01150.01020000_a.10000400.pdf.

¹⁰⁴ Japanese Civil Code of 1898, art 415 in De Becker, *Annotated Civil Code of Japan*, vol 2, 25.

¹⁰⁵ *ibid* 22.

¹⁰⁶ *ibid* 25.

aspect of specific performance. In fact, the provisions concerning the enforcement of performance are contained in the German Civil Procedure Code. Second, Article 414 recognises the distinction between obligations to give, obligations to do and not to do, which is a main characteristic of the French law of obligations. The enforcement of performance in Article 414 appears to accord with this distinction. This feature is clearly not a main feature of the law of obligations in the BGB. Third, both Articles 414 and 415 appear to keep a balance between the positions of specific performance and damages. The last paragraph of Article 414 with confirmation of Article 415 states that ‘the provisions of the proceeding three Paragraphs do not affect a demand for compensation for damages [sic]’. Without knowledge of Japanese jurisprudence, the texts of these two provisions easily leads us to understand that, in case of breach of contract, the creditor is always entitled to both remedies, specific performance and damages concurrently. Article 415, other than the second part concerning impossibility of performance, does not directly impose any condition as to the fault element¹⁰⁷ or give the debtor a second chance to perform his obligation. This feature clearly is not a product of the German concept of specific performance and the German principle of fault (*Verschuldensprinzip*), which is a ‘requirement for the availability of contractual remedies’.¹⁰⁸ The analysis of these three features point to the conclusion that Articles 414 and 415 were not mainly based on the BGB provisions as De Becker’s book suggests.

On closer examination of De Becker’s links between the Japanese and German provisions, from both conceptual and linguistic perspectives, there is hardly a link between the Japanese Article 414 and ss 249 and 251 BGB. Ss 249 and 251 BGB concern restitution in kind while Article 414 enforcement of performance. Article 415 appears to deals with two situations, the right to compensation for damage in general and the right to compensation for damage in case of impossibility of performance owing to a cause attributable to the debtor. These two situations are irrelevant to s 250 BGB. One may identify a superficial link between s 286 BGB, which concerns the right to damages in case of delay, and s 325, which concerns the right to damages in case of impossibility of performance in reciprocal contracts, and Article 415 because they all deal with the same topic, the right to damages. However,

¹⁰⁷ Akira Kamo, ‘Crystallization, Unification, or Differentiation? The Japanese Civil Code (Law of Obligations) Reform Commission and Basic Reform Policy (Draft Proposals)’ (2010) 24 CJAL 171, 194.

¹⁰⁸ GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 8. See also Arthur von Mehren and James Russell Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little, Brown 1977) 1106; Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 380–81.

one cannot leap to the conclusion that Article 415 was modelled on ss 286 and 325 BGB as De Becker's book suggests. This is because while in Japanese law the right to damages in Article 415 coexists with the right to specific performance in Article 414 as equal remedies, in German law, the right to compensation for damage is generally a secondary remedy of non-performance, which can be invoked when certain requirements are satisfied.¹⁰⁹

The analysis above is consistent with some Japanese scholars' latest observations; the reassessment of the reception of foreign civil law in Japan has led them to reconsider the origins of certain provisions of the Minpō, including Articles 414 and 415. Kitagawa contended that Articles 414 and 415 were products of the *Code civil*.¹¹⁰ This view is more convincing than the suggestion that the provisions were based on the BGB as implied by De Becker's. Even from a linguistic perspective we find some similarities between the texts of Articles 414 and 415 and some French provisions.

¹⁰⁹ Dagmar Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 140. See also Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 776; Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 50.

¹¹⁰ Kitagawa, 'Japanese Civil Law' 21–23. See also Kiyoshi Igarashi, *Einführung in das japanische Recht* (Wissenschaftliche Buchgesellschaft 1990) 5. See also Noda, *Introduction of Japanese Law* 51.

The French <i>Code civil</i> of 1804	Article 414 of the Minpō of 1898
<p>Article 1142 Any obligation to do or not to do resolves itself into damages, in case of non-performance on the part of the debtor.¹¹¹</p> <p>Article 1143 Nevertheless, a creditor is entitled to request that what has been done through breach of the undertaking be destroyed; and he may have himself authorized to destroy it at the expense of the debtor, without prejudice to damages, if there is occasion.¹¹²</p> <p>Article 1144 A creditor may also, in case of non-performance, be authorized to have the obligation performed himself, at the debtor's expense.¹¹³</p> <p>Article 1145 Where there is an obligation not to do, he who violates it owes damages by the mere fact of the violation.¹¹⁴</p>	<p>When a debtor does not voluntarily perform the obligation, the creditor may make a demand for compulsory performance to the Court, unless the nature of the obligation does not permit it.</p> <p>When the nature of the obligation does not permit of compulsory performance of an act for its subject, the creditor may demand the Court to cause a third person to do the same at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.</p> <p>With regard to an obligation which has a forbearance for its subject the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.</p> <p>The provisions of the proceeding three Paragraphs do not affect a demand for compensation for damages.</p>

Table 5 - 3: Comparisons between the texts of the rules concerning specific performance in the *Code civil* of 1804 and Minpō of 1898

The Japanese Article 414 conceptually resembles the French Articles 1142 to 1143 at least in three aspects. First, the two laws deal with methods for enforcing performance: they emphasise the procedural side of specific performance. Second, they draw a distinction between obligations to give and obligations to do and not to do. Performance is enforced in accordance with this distinction. Third, specific performance does not prejudice the creditor's right to claim compensation for damage.

¹¹¹ *Code civil*, art 1142 tr by Legifrance
<<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20060406>> accessed 17 January 2013.

¹¹² *ibid* art 1143.

¹¹³ *ibid* art 1144.

¹¹⁴ *ibid* art 1145.

The French <i>Code civil</i> of 1804	Article 415 of the Minpō of 1898
<p>Article 1147 A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part.¹¹⁵</p> <p>Article 1148 There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event.¹¹⁶</p>	<p>When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor.</p>

Table 5 - 4: Comparisons between the texts of the rules concerning damages in the *Code civil* of 1804 and Minpō of 1898

Despite Article 415's affirmation of equality between specific performance and damages, it is not completely certain that this provision was founded on French law.¹¹⁷ One important reason is that Article 415 does not adopt the French principle of *force majeure* but appears to borrow the German term 'impossibility of performance'. This means that *force majeure* is not a requirement for impossibility of performance in Japanese law. Another reason is that while the French Article 1147 uses the terms 'non-performance' and 'delay', which are usually associated with the principle of fault,¹¹⁸ as causes of compensation for damage, the Japanese Article 415 appears to require only that 'the debtor does not performance the obligation'. This may lead us to understand that once the debtor fails to perform his obligation regardless of any reasonable excuse, for example *force majeure*, he is always responsible for damages. Clearly, this understanding belongs to neither German nor French jurisprudence. However, in reality, the German principle of fault was

¹¹⁵ *ibid* art 1147.

¹¹⁶ *ibid* art 1148.

¹¹⁷ Tamura, 'Modernization Process in Japan' 40.

¹¹⁸ Barry Nicholas, *The French Law of Contract* (2nd edn, Clarendon Press 1992) 30–31. However, none of *Code civil* provisions expressly recognises the principle of fault.

adopted by Japanese lawyers in determining contractual liability.¹¹⁹ The reception of German jurisprudence in interpreting the rules of non-performance and remedies for non-performance is discussed below.

2.2 'Germanisation' of the Japanese concept of non-performance and remedies for non-non performance

The historical and theoretical analysis above provides clues as to the origin and theoretical foundations of Articles 414 and 415. Despite what the draftsmen said and what the wording of both provisions looks like, it does not necessarily follow that Japanese lawyers relied on this information in understanding the rules. It is therefore necessary to explore how Articles 414 and 415 were actually explained in law books. This thesis focuses on two of De Becker's publications on the Minpō, namely *Annotated Civil Code of Japan* (1909) and *The Principles and Practice of the Civil Code of Japan: A Complete Theoretical and Practical Exposition of the Motifs of the Japanese Civil Code* (1921) because they were the main, if not sole sources of Japanese civil law on which Thai draftsmen relied. Although De Becker was a native of Great Britain, his 1909 book is regarded as 'the most useful' translation of the Minpō and his 1921 book was an 'essential' commentary in English speaking countries.¹²⁰

In Japanese law, the understanding of contractual liability, namely breach of contract and contractual remedies, was profoundly influenced by German jurisprudence.¹²¹ According to Kitagawa, 'the discussion on contractual liability may be seen as a classical example of such reception of German legal theory'.¹²² Breach of contract has been taxonomised in accordance with German jurisprudence, namely impossibility of performance, delayed performance and imperfect performance.¹²³ In the Minpō, there is no provision dealing with initial impossibility of performance while subsequent impossibility is contained in the second part of Article 415, which also deals with another type of breach of contract, imperfect performance. Despite the fact that initial impossibility is not expressly recognised by the Minpō, according to Kitagawa, 'the draftsmen clearly stated that initial impossibility made a contract null and void'.¹²⁴ Subsequent impossibility, which is a main category of breach of

¹¹⁹ Kamo, 'Crystallization' 194.

¹²⁰ Richard W Rabinowitz, 'Materials on Japanese Law in Western Languages' (1955) 4 AJCL 97, 99.

¹²¹ Kamo, 'Crystallization' 191; Kitagawa, 'Japanese Civil Law' 21.

¹²² Kitagawa, *ibid.*

¹²³ Kamo, 'Crystallization' 193; Oda, *Japanese Law* 137–38.

¹²⁴ Kitagawa, 'Japanese Civil Law' 20. See also Oda, *ibid* 137.

contract, is recognised in Article 415. At the meeting of the draft examination, Hozumi, who drafted this provision, explained that the Japanese concept of impossibility of performance is not confined to *force majeure* and fortuitous accidents.¹²⁵ This implied that the German concept of impossibility of performance was adopted.

Delayed performance is dealt with exclusively in Article 412, which states:

When there is a certain (definite) term for the performance of an obligation [,] the debtor is responsible for delay (is in mora) from the time when the term arrives.

When there is an uncertain (indefinite) term for the performance of an obligation, the debtor is responsible for delay (is in mora) from the time he knew of the arrival of the term.

When there is no fixed term for the performance of the obligation the debtor is responsible for delay (is in mora) from the time when he has received a demand for performance.¹²⁶

De Becker explained that 'this article determines the point of time from which the debtor becomes responsible for delay' and referred it to s 284 BGB.¹²⁷ An important question arises from this reference as to how Article 412 of the Minpō and s 284 BGB are related. The two provisions are obviously literally different particularly regarding obligations with no fixed time of performance. Article 412(3) clearly states that the debtor is responsible for delay when he receives a demand for performance from the creditor. This provision resembles the concept of *Mahnung* in German law. However, while s 326 BGB requires the creditor to give the debtor a second chance (*Nachfrist*) before he can seek damages in lieu of performance and rescission, this requirement is not incorporated into the Minpō. This means that the creditor can demand damages in lieu of performance without giving the debtor an additional period of time to discharge his duty.¹²⁸ Moreover, in the Minpō, there is no provision similar to s 285 BGB, which recognises the principle of fault as a crucial factor in determining breach of contract caused by delay. With the help of a Japanese court the principle of fault was incorporated into Japanese contract law though not in a systematic manner. In 1922, the Supreme Tribunal of Japan set a

¹²⁵ Tamura, 'Modernization Process in Japan' 40.

¹²⁶ Japanese Civil Code of 1898, art 412 in De Becker, *Annotated Civil Code of Japan*, vol 2, 19.

¹²⁷ De Becker, *ibid*.

¹²⁸ *ibid* 19-20. But if the creditor prefers to rescind the contract the general rule is that he must give the debtor a second chance to perform, see Japanese Civil Code of 1898, art 541: 'If one party does not perform his obligation, the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time the other party may rescind it.'

precedent that the debtor's fault was a prerequisite to the right to claim damages in case of delay.¹²⁹

Imperfect performance is the third category of breach of contract which is contained in the first part of Article 415. Literally, this provision seems to encompass all types of breach of contract as it states 'when the debtor does not perform the obligation in accordance with the true intent and purpose of the same'. This interpretation is confirmed by De Becker's commentary on Article 415, where he elaborated on the situations which fell within the scope of this provision. He wrote:

The true intent and purpose of an obligation consists in making the prestation which agrees with the subject of the obligation on the date and at the place fixed for performance. When, therefore, the performance is effected behind time or at a different place, or a thing with latent defects (*kakuretaru kasha aru mono*) is delivered, the act is not in accordance with the true intent and purpose of the obligation.¹³⁰

Kitagawa observed that the interpretation of Article 415 in this manner was usual at the time of enactment of the Minpō of 1898. As a result, the original understanding of Article 415 is that it covered any situation which the debtor failed to completely perform his obligation, including delay, impossibility and defects. He explained that the concept of impossibility which is contained in the last sentence of the article was used as an illustration and therefore not treated as a principal form of breach of contract as it was in German civil law.¹³¹

However, the conceptual and practical understanding of Article 415 dramatically changed after the 'germanisation' of contractual liability in Japanese civil law. According to Kitagawa, 'this is because civil law scholars introduced the German default provision's bipartite structure of delay in performance and impossibility of performance and the principle underlying such parallel structure (ie initial impossibility theory) into Japan and these concepts became the conceptual backbone of Japanese law of obligations'.¹³² After the concept of positive breach of contract had judicially been introduced to German contract law as the third form of breach of contract, the Japanese found a way to import it to their private law system. They have used and construed their existing Article 415 as a reflection of the

¹²⁹ Judgement of the Supreme Tribunal (22 November 1922) Minroku 27-1978 cited in Oda, *Japanese Law* 138.

¹³⁰ De Becker, *Annotated Civil Code of Japan*, vol 2, 24.

¹³¹ Kitagawa, 'Japanese Civil Law' 19–20.

¹³² *ibid* 22. See also Kamo, 'Crystallization' 193.

German concept of positive breach of contract.¹³³ An example can be found in Hiroshi Oda's recent book on Japanese law where on Article 415 he explains that:

[it] is denoted as imperfect performance in that the obligation may have been performed, but not in a proper manner. An example is the delivery of defective goods in a contract for sale. Another example is where the obligor delivered poultry infected with disease, which later spread to the obligee's farm.¹³⁴

In the footnote to this statement he added that 'German theory categorises such improper performance as positive breaches of obligation (*positive Vertragsverletzungen*)'.¹³⁵ Having accepted the new judicially-invented concept of German law, Japanese civil law with regard to contractual liability has completely followed the German-type tripartite structure theory that breach of contract exists in three forms, delayed performance, impossibility of performance and positive breach of contract.¹³⁶

2.3 The primacy of specific performance in the Minpō

Article 414, the basis of the concept of specific performance in Japanese law, was understood differently before it was 'germanised'. According to Kitagawa,

at the time of enactment of the Minpō of 1898, the term 'compulsory performance' in Article 414(1) was understood as 'direct compulsion of performance' which may include even physical restraint of the obligator. Accordingly, alternative performance provided in the second paragraph of the same article was understood literally to mean an alternative method for compulsion of performance that could be used where direct compulsion could not be conducted.¹³⁷

Later, the interpretation of Article 414 was reshaped in accordance with German jurisprudence. This is illustrated by De Becker's commentary on this provision where he commented that it determined the right of the creditor where he failed to

¹³³ *ibid* 22-23.

¹³⁴ Oda, *Japanese Law* 138.

¹³⁵ *ibid*.

¹³⁶ Kitagawa, 'Japanese Civil Law' 22-23.

¹³⁷ *ibid* 23-24.

perform his obligation and where he referred this provision to ss 249 and 251 BGB.¹³⁸

Despite the recognition of specific performance as a contractual remedy and despite the attempt to construe it in accordance with German jurisprudence, specific performance has never retained its position as the sole primary contractual remedy in Japanese civil law from the beginning. This means that Japan's system of specific performance is fundamentally different from Germany's. There are at least two reasons for supporting this conclusion. First, if the concept of imperfect performance, which is laid down by Article 415, is interpreted as the source of all kinds of breach of contract as De Becker propounded, the right to claim damages is also regarded a primary remedy as the provision clearly states. Even if this law is only understood to be a form of breach of contract which is comparable to positive breach of contract in German law as many Japanese lawyers suggest, the right to claim damages is still regarded as a primary right for breach of contract. This is because Article 414(4) clearly states that the right to specific performance mentioned in the first three paragraphs of Article 414 does not affect the right to claim compensation for damage. Both Hozumi, who drafted Article 414, and Ume, the chief draftsman, consistently affirmed that both specific performance and damages were the primary remedies for non-performance (See 2.1 above).¹³⁹ This is proof that Japanese law accepts the coexistence of two primary remedies, specific performance and damages, for breach of contract. The clear wording of Articles 414 and 415 appears to provide no room for German legal science to intervene in their clear literal meaning. To illustrate how early commentators of the Minpō explained the relationship between specific performance and damages, it is worth examining De Becker's commentary on Article 414. He wrote:

What should the creditor do if the debtor fails to make voluntary performance in accordance with the rules detailed [Article 414] so far? There are two alternatives presented to him for his choice, namely (1) to enforce performance, or (2) to demand compensation for damages [sic].¹⁴⁰

Second, Article 414 focuses on the procedural aspect of specific performance. This is not what s 241 BGB has been thought of. As Kitagawa pointed out that

¹³⁸ De Becker, *Annotated Civil Code of Japan*, vol 2, 22–23. See also JE De Becker, *The Principles and Practice of the Civil Code of Japan: A Complete Theoretical and Practical Exposition of the Motifs of the Japanese Civil Code* (Butterworth 1921) 262–63.

¹³⁹ p 164 above.

¹⁴⁰ De Becker, *Principles and Practice* 262. See also De Becker, *Annotated Civil Code of Japan* 22–25.

Article 414 was originally understood as direct compulsion of performance, it is not surprising that some modern commentators of Japanese civil law interpret this article as the source of methods of enforcement of the contract rather the source of the right to performance under substantive law. For example, Oda did not categorise specific performance a substantive right; instead it was explained under the head of 'Enforcement of obligation'. On the other hand, only the right to claim damages is mentioned in the topic 'Effects of irregularity of performance' in which he explained that the creditor had the right to claim damages in case of breach of contract, namely delayed performance, impossibility of performance and imperfect performance.¹⁴¹

When comparing the concept of specific performance as propounded by De Becker in his *The Principles and Practice of the Civil Code of Japan* with that of Schuster in his *The Principles of German Civil Law*, one finds some apparent differences between the two concepts, namely that specific performance is not the only primary remedy for non-performance and that not every obligation gives rise to specific performance. Plod claimed that the draftsmen of the Code of 1925 used these two books as the principal sources of information on the Minpō of 1898 and the BGB respectively.¹⁴² The question remains as to whether Plod and the Thai draftsmen actually consulted the two sources to compare the German and Japanese concepts of specific performance before copying the relevant Japanese and German rules. This will be investigated in the next chapter.

CONCLUSION

Plod's belief that the Minpō was practically a copy of the BGB of 1900 was a misconception. The reception of foreign civil law in Japan was not as simple as Plod and Watson thought. For some decades, Japanese scholars have been aware that, in terms of the content of the Minpō, German law does not outweigh French law and that German jurisprudence came to its predominant position in the Japanese system of private law because of the 'reception theory' or the 'germanisation' of legal concepts and institutions of the Code, which occurred after the Code came into effect. This is the most convincing reason why in his book *Annotated Civil Code of Japan* of 1909, the BGB of 1900 was the only foreign law which De Becker linked to

¹⁴¹ Oda, *Japanese Law* 140–41.

¹⁴² Manavarajasevi, *Interviews* 8–9.

the Japanese provisions. This misleading information led Plod into believing that the Minpō was a copy of the BGB and the referencing in De Becker's book was a product of the Japanese draftsmen. In this chapter, three important facts have been discovered: first the Japanese draftsmen did not simply 'copy' the text of foreign law as the Thai draftsmen did; second, they did not exclusively rely on the BGB but, in fact, consulted a variety of foreign statutes and materials; and third, they did not produce an official list of the sources that they consulted: De Becker's book misled Plod into believing they did. The case study of specific performance in the Minpō shows that the relevant rules have significant French characteristics and the Japanese did not adopt the German principle of the primacy of specific performance because Article 414 clearly states that specific performance and damages are primary remedies for non-performance and implies that some types of obligations, notably obligations to do and not to do, cannot be enforced specifically. Since the Thai Code of 1925 was founded on Plod's misconception about the reception of German law in Japan, some important questions arise as to how such misconception affected the drafting of individual rules of the Code and how this has affected Thai lawyers' understanding of the rules. We will examine these questions in the next chapter.

CHAPTER 6

THE DRAFTING OF THE RULES OF SPECIFIC PERFORMANCE IN THE CIVIL AND COMMERCIAL CODE OF 1925 AND THE THAI CONCEPT OF SPECIFIC PERFORMANCE

INTRODUCTION

It was shown in Chapter 4 that Ernst Schuster in his *The Principles of German Civil Law*, on which the draftsmen of the Civil and Commercial Code of 1925 ('Code of 1925') heavily relied for understanding the BGB of 1900, expounded the German principle of the primacy of specific performance according to mainstream German jurisprudence.¹ However, Chapter 5 has demonstrated that the rules of specific performance in the Japanese Civil Code of 1898 ('Minpō of 1898') were of French rather than German heritage and that despite the 'germanisation' of breach of contract in Japan, the Japanese appeared to have treated specific performance and damages as remedies for non-performance equally. It has also revealed that Plod and other Thai draftsmen were misled by De Becker's *Annotation of Civil Code of Japan* into believing that the Minpō of 1898 was practically a copy of the BGB of 1900. An important question arises as to how the draftsmen of the Code of 1925 adopted both German and Japanese provisions which represent different concepts in establishing the rules concerning specific performance. But a more important question is how the rules drafted based on the misconception of the origin of model rules affected Thai lawyers' conceptual understanding of specific performance.

This chapter aims to answer both questions. In the first part, it explores the drafting of the rules relating to non-performance and specific performance especially to examine how the foreign rules of specific performance were borrowed and how the draftsmen's misconception about the reception of German law in Japan influenced the making of the Thai rules. It also ascertains whether the draftsmen

¹ See ch 4, '2.2 The concept of specific performance in Ernest Schuster's *The Principles of German Civil Law*' p 143 above.

possessed knowledge of foreign law or were aware of the principles behind the rules that they adopted at the time of codification. The second part of this chapter concerns a broad examination of Thai literature on specific performance and relevant topics to discover how legal borrowing without ‘a systematic knowledge of the law’ has affected Thai lawyers’ conceptions of specific performance.

1. THE DRAFTING OF SPECIFIC PERFORMANCE PROVISIONS IN THE CODE OF 1925

1.1 The structures of Book II and the provisions relating to non-performance and remedies for non-performance

After it had reviewed some early provisions of Book I of the Civil and Commercial Code of 1923 (‘Code of 1923’) one by one and had drafted new articles to replace the old ones, the drafting committee tasked Plod with reorganising the approved provisions in accordance with the Minpō of 1898 at the meeting on 25 May 1925.² Having had experience with the drafting of Book I, the draftsmen seem to have worked on Book II on Obligations more systematically; the outline of it was made before the drafting of its provisions began. Once more, Plod and his brother, Chitr, were responsible for the structuring of Book II. On 17 August, they informed the meeting that the arrangement of Book II they had prepared was ‘a product of a comparative study of the BGB, the Minpō, the Brazilian Civil Code and the Swiss Federal Code of Obligations’ [my translation].³ On closer examination, the Thai structure bears closest similarity to the Japanese one, which appears to be a modified version of the structure of Book II of the BGB as shown in the following comparison.

² National Archive of Thailand, Office of the Council of State Doc No 3, Book 4(2), ‘รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 กันยายน ถึง 27 มีนาคม พ.ศ. 2467 (Minutes of the Meetings of the Committee of Legislation)’ (1 September 1924 - 27 March 1925); *ibid* Doc No 3, Book 5(1), ‘รายงานการประชุมกรรมการร่างกฎหมายตั้งแต่วันที่ 1 สิงหาคม ถึง 27 ตุลาคม พ.ศ. 2468 (Minutes of the Meetings of the Committee of Legislation)’ (1 August - 27 October 1925).

³ ‘Meeting Minutes’ (27 August 1925) 3. It is not clear which English translation of the Brazilian Civil Code the draftsmen used but it is highly possible that it was *The Civil Code of Brazil* translated by Joseph Wheless and published by Thomas Law Book Co in 1920.

Book II of the BGB of 1900 (Wang) ⁴	Book III of the Minpō of 1898 (De Becker) ⁵	Book II of the Code of 1925 (Book of the Revised Drafts) ⁶
Law of Obligations First Section Scope of Obligations First Title Obligation of Performance Second Title Default of the Creditor Second Section Obligation Ex Contractu First Title Creation of an Obligation – Scope of a Contract Second Title Mutual contract Third Title Promise of Performance in favour of a Third Party Fourth Title Earnest - Stipulated Penalty Fifth Title Rescission Third Section Extinction of Obligations First Title Fulfilment Second Title Lodgment Third Title Set-off Fourth Title Release	Obligations (<i>Obligatio</i>) Chapter I General provisions Section 1 Of the Subjects of Obligations Section 2 Of the Effect of Obligations Section 3 Obligations with a Plurality of Parties Sub-Section 1 General Provisions Sub-Section 2 Indivisible Obligations Sub-Section 3 Joint Obligations Sub-Section 4 Suretyship Section 4 Assignment of Obligations Section 5 Of the Extinction of Obligations Sub-Section 1 Of Performance Sub-Section 2 Of Set-off (<i>Compensatio</i>) Sub-Section 3 Of Novation (<i>Novatio</i>) Sub-Section 4 Of Remission (Release) Sub-Section 5 Of Confusion (<i>Confusio</i>) Chapter II Of contracts	Obligations Title I General Provisions Chapter I Subject of Obligations Chapter II Effect of Obligations Part I Non-performance Part II Subrogation Part III Exercising debtor's Claims Part IV Cancellation of fraudulent acts Part V Right of retention Part VI Preferential rights Chapter III Plurality of debtors and creditors Chapter IV Transfer of Claims Chapter V Extinction of Obligations Part I Performance Part II Release Part III Set off Part IV Novation Part V Merger Title II Contract

Table 6 - 1: Comparison between the structures of Book II of the BGB of 1900, Book III of the Minpō of 1898 and Book II of the Code of 1925

Based on the structure of Book III of Obligations of the Minpō in De Becker's *Annotated Civil Code of Japan*, the provisions of Book II of the Code of 1925 concerning non-performance and remedies for non-performance are subsumed under Chapter II entitled 'Effect of Obligations'. However, while there is no further division under the Japanese heading of Effect of Obligations, the Thai draftsmen divided the chapter of the same name into six parts and put the provisions concerning non-performance and remedies for non-performance in the first part of the chapter entitled 'Non-performance'.

⁴ Chung Hui Wang, *The German Civil Code: Translated and Annotated* (Stevens and Sons 1907) x.

⁵ JE de Becker, *Annotated Civil Code of Japan*, vol 2 (Butterworth 1909) Contents.

⁶ Office of the Council of State, Doc No 79, 'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925) 11.

Heading	Article	Contents
Chapter I Subject of Obligations	194	The nature of obligatory rights and duties / the right to specific performance
Chapter II Part I	203, 204 and 206	Debtor's delay (<i>mora solvendi</i>)
	205	Debtor's excuse for delay – the principle of fault
	207-210	Creditor's delay (<i>mora accipiendi</i>)
	211-212	Creditor's excuse for delay
	213	Compulsory performance / the creditor's right to specific performance / the creditor's right to compensation for damage
	215	Imperfect performance / the creditor's right to compensation for damage
	216 and 217	The effects of delayed performance
	218	Impossibility of performance (debtor's fault) / the principle of fault
	219	Impossibility of performance (without debtor's fault) / the principle of fault
	222-225	Compensation for damage

Table 6 - 2: Structure of Code of 1925 provisions relating to non-performance and remedies for non-performance

1.2 The making of specific performance rules and relevant provisions

Since all of Books I and II were drafted by copying, there can be no doubt that the provisions relating to non-performance and remedies for non-performance were borrowed from foreign law. Despite the fact that the drafting committee set up the outline of Book II before starting drafting its provisions, the non-performance provisions were not considered collectively and systematically but rather individually. The draftsmen reviewed the relevant provisions of the Code of 1923 article by article in accordance with the framework. Almost all of them were

abandoned and replaced by newly drafted provisions, most of which were copied from the BGB and some of which from the Minpō as shown in following table. Inspired by De Becker's method which was misinterpreted by Plod as a method used by the Japanese draftsmen,⁷ in each draft provision, the draftsmen made reference to foreign provisions (see the list of abbreviations of foreign law, statutes and texts in ch 3 above)⁸

English drafts of the Code of 1925	Foreign models
Article 194 By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance. (G.241) ⁹	BGB (1900) s 241 By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance. ¹⁰
Article 203 If a time for performance is neither fixed nor to be inferred from the circumstances, the creditor may demand the performance forthwith, and the debtor may perform this part forthwith. If a time is fixed it is to be presumed, in case of doubt, that the creditor may not demand the performance before that time; the debtor, however, may perform earlier. (G. 271) ¹¹	BGB (1900) s 271 If a time for performance is neither fixed nor to be inferred from the circumstances, the creditor may demand the performance forthwith, and the debtor may perform his part forthwith. If a time is fixed it is to be presumed, in case of doubt, that the creditor may not demand performance before that time; the debtor, however, may perform earlier. ¹²
Article 204 If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning. If a time by the calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice. (C/P G.284; S.O. 102) ¹³	BGB (1900) s 284 If the debtor does not perform after warning given by the creditor after maturity, he is in default through the warning. Bringing and action for the performance and the service of an order for payment in hortatory process are equivalent to warning. If the time by the calendar is fixed for the performance, the debtor is in default without warning if he does not perform at the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice. ¹⁴
Article 205 The debtor is not in default so	BGB (1900) s 285 The debtor is not in default

⁷ Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (*Transcript of the Interviews with Phraya Manavarajasevi*) (Thammasat University 1982) 9. The original texts states:

‘แล้วผู้ปุ่นนั้นมันไม่ปิดหรอก เขาก็อปี่มาจากไหนก็บอกเอาไว้’.

⁸ p 112 above.

⁹ ‘Book of the Revised Drafts’ 103.

¹⁰ Wang, *German Civil Code* 55.

¹¹ ‘Book of the Revised Drafts’ 106.

¹² Wang, *German Civil Code* 61.

¹³ ‘Book of the Revised Drafts’ 106.

¹⁴ Wang, *German Civil Code* 64–65.

English drafts of the Code of 1925	Foreign models
<p>long as the performance is not effected in consequence of a circumstance for which he is not responsible. (G.285)¹⁵</p>	<p>so long as the performance is not effected in consequence of a circumstance for which is not responsible.¹⁶</p>
<p>Article 213 If the debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance; except where the nature of the obligation does not permit it.</p> <p>When the nature of an obligation does not permit of compulsory performance, if the subject of the obligation is the doing of an act, the creditor may apply to the Court to have it done by a third person at the debtor's expense but if the subject of the obligation is the doing of a juristic act, a judgment may be substituted for a declaration of intention by the debtor.</p> <p>As to an obligation whose subject is the forbearance from an act, the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.</p> <p>The provisions of the foregoing paragraphs do not affect the right to claim damages. (C/P old text 331-334; C/P J.414; Restitution in kind G.249-251 included in this section).¹⁷</p>	<p>Minpō, Article 414 When a debtor does not voluntarily perform the obligation, the creditor may make a demand for compulsory performance to the Court, unless the nature of the obligation does not permit it.</p> <p>When the nature of the obligation does not permit of compulsory performance, if the obligation has the performance of an act for its subject, the creditor may demand the Court to cause at a third person to do the same at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.</p> <p>With regard to an obligation which has a forbearance for its subject the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.</p> <p>The provisions of the preceding three Paragraphs do not affect a demand for compensation for damages [sic]. (In reference vide Art. 415 and the Code of Civil Procedure Art. 73-76; Also Arts. 249 and 251 of the German Civil Code.)¹⁸</p>
<p>Article 215 When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damage caused there by. (C/P J.415)¹⁹</p>	<p>Minpō, Article 415 When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (<i>in forma specifica</i>), the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor. (In reference vide Art. 414; also Arts. 250, 286 and 325 of the German Civil Code.)²⁰</p>
<p>Article 218 When the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance. In case of a partial impossibility the</p>	<p>BGB (1900) s 280 Where the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance.</p>

¹⁵ 'Book of the Revised Drafts' 107.

¹⁶ Wang, *German Civil Code* 65.

¹⁷ 'Book of the Revised Drafts' 109.

¹⁸ De Becker, *Annotated Civil Code of Japan*, vol 2, 22.

¹⁹ 'Book of the Revised Drafts' 109.

²⁰ De Becker, *Annotated Civil Code of Japan*, vol 2, 25.

English drafts of the Code of 1925	Foreign models
creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if the still possible part of performance is useless to him. (G.280) ²¹	In case of partial impossibility the creditor may, by declining the still possible part of performance, demand compensation for non-performance of the entire obligation, if he has no interest in the partial performance. The provisions of 346 to 356 applicable to the contractual right of rescission apply mutatis mutandis (f). ²²
Article 219 The debtor is relieved from his obligation to perform if the performance becomes impossible in consequence of a circumstance for which he is not responsible occurring after the creation of the obligation. If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible. (G.275) ²³	BGB (1900) s 275 The debtor is relieved from this obligation to perform if the performance becomes impossible in consequence of a circumstance for which he is not responsible (z) occurring after the creation of the obligation (a). If the debtor, after the creation of the obligation, becomes unable to perform, it is equivalent to a circumstance rendering the performance impossible (b). ²⁴

Table 6 - 3: Comparisons between Code of 1925 provisions relating to non-performance and remedies for non-performance and their model rules

The table above shows that most of the draft provisions were simply copies of their model rules. There are some linguistic alterations in Article 213, a copy of De Becker's translation of Article 415 of the Minpō, concerning compulsory performance, which does not change the literal meaning of the model provision while Article 215 is a partial copy of De Becker's translation of Article 415. The second part of Article 415 relating to impossibility of performance was ignored since it was contained in separate provisions, namely Articles 218 and 219, modelled on the BGB. The draftsmen's discussion of the provisions in the table above reflects their general method for drafting the Code: they focused more on the wordings of the model rules than their conceptual foundations. According to the meeting minutes, some typical words and phrases, for example 'lengthy wording' and 'articulate wording', were used to show the draftsmen's judgement about the discussed model rules.²⁵ This illustrates the draftsmen's emphasis on the linguistic aspect of the model rules.

At first glance, the outline of Part I of Chapter II of Code of 1925 Book II consisting of delayed performance, imperfect performance, impossibility of

²¹ 'Book of the Revised Drafts' 110.

²² Wang, *German Civil Code* 63–64.

²³ 'Book of the Revised Drafts' 111.

²⁴ Wang, *German Civil Code* 62.

²⁵ See eg 'Meeting Minutes' (18 August 1925) 2-3.

performance, the right to specific performance and the right to damages seems to represent a well-organised system of non-performance following Japanese and German law. However, a detailed examination of the relevant meeting minutes proves that there was neither discussion about the underlying principles of the system of non-performance nor discussion about how each type of non-performance was conceptually connected and how it led to the remedies for non-performance. The draftsmen did not consult the meeting minutes of the drafting committee of the BGB and Minpō; they paid attention to the end products of Germany and Japan's codifications. This leaves no doubt that they did not discuss the Roman foundations of the modern concepts of non-performance and remedies for non-performance.

The draftsmen's adherence to the linguistic aspect of the rules is well illustrated by the drafting of the provision relating to the rights to specific performance and compensation for damage. On 24 August, the meeting reviewed Articles 331 to 334 of the Code of 1923,²⁶ which concern specific performance, in comparison with Article 414 of the Minpō, Articles 956 and 957 of the Brazilian Civil Code and ss 249 and 251 BGB. Chitr proposed that Article 414 of the Minpō should be adopted since it was similar to the old Thai provisions (Articles 331 to 334 of the Code of 1923) but that the word 'wilfully'²⁷ in the Japanese model seemed unnecessary and should be removed.²⁸ Cazeau suggested that the phrase 'under the expense of the debtor' should be added to the draft of the new provision to clarify the wording. The meeting approved Chitr and Cazeau's proposals to draft a provision (present Article 213) relating to specific performance modelled on Article 414 of the Minpō with a few alterations and agreed to drop Articles 331 to 334 of the Code of 1923.²⁹ Other than Chitr and Cazeau's proposals, there was no record of further discussion of the drafting of Article 213 on 24 August. However, at the meeting on 27 August, Plod, after reviewing the wording of the draft of Article 213 of 24 August, suggested that the drafting committee should reconsider it. He

²⁶ Code of 1923, art 331: 'Where specific performance is possible and desirable the Court may at its discretion sanction the creditor's demand for specific performance.

Art 332: 'If the subject of the obligation is the doing of an act, the creditor may apply to the Court to have it done by a third person at the debtor's expense'. [My translation]

Code of 1923, art 333: 'If the subject of the obligation is to do a juristic act or give a consent, the Court may appoint a third person to act on behalf of the debtor or a judgment may be substituted for a declaration of intention by the debtor'. [My translation]

Code of 1923, art 334: 'If the subject of the obligation is the forbearance from an act, the Court may order that what has been done be removed at the expense of the debtor and impose proper measures adopted for the future'. [My translation]

²⁷ This word does not exist in De Becker's translation of art 414. In fact, De Becker used the term 'voluntarily'. It is more likely that the recorder of the meeting wrote down the wrong word or otherwise Chitr made a mistake in saying the wrong word.

²⁸ 'Meeting Minutes' (24 August 1925) 2.

²⁹ *ibid*, 2-3.

proposed that, since in English law the term ‘specific performance’ used in the draft of 24 August had a narrow meaning, to cover the cases of restitution in kind as stated in ss 249 and 251 BGB, it should be replaced by the term ‘compulsory performance’ as used by De Becker in his translation of Article 414. He said:

As I have examined the draft of Article 20 [present Article 213], I think that the term ‘specific performance’ according to English law has a too narrow meaning, and I therefore propose that we change it to ‘compulsory performance’ to accord with Article 414 of the Japanese Civil Code. Based on Sections 249 and 251 of the German Civil Code, this Japanese provision includes ‘restitution in kind’.³⁰ [My translation]

The meeting approved Plod’s proposal. (See the comparison between Article 213 of the Code of 1925 and Article 414 of the Minpō above.) This proposal shows that Plod relied on De Becker’s sources of Article 414 of the Minpō which referred to ss 249 and 251 BGB. As the origin of Article 414 of the Minpō was discussed in Chapter 5 above, it can now be shown that this reference is misleading: Article 414 in fact reflects French law. Furthermore, as discussed in Chapter 5 above, ss 249 and 251 BGB were not actually incorporated into the draft of Article 414 by Hozumi because Article 414 apparently deals with the enforcement of performance, not restitution in kind. (See Chapter 5, 2.1 ‘An anatomy of Articles 414 and 415 of the Minpō of 1898’.)³¹

The draftsmen of the Code of 1925 not only borrowed the Japanese rule of specific performance (Article 414) they also copied the German provision, which lays the foundation of the concept of specific performance, s 241 BGB, word for word (see the comparison in the following table). This German provision was not adopted by the Japanese draftsmen who instead borrowed French law to establish the rule of specific performance in Article 414 of the Minpō. A question arises as to how the Thai draftsmen kept two conflicting foreign model rules of specific performance in the same place.

³⁰ *ibid* (27 August 1925) 3.

³¹ p 163 above.

English draft of Article 194 of the Code of 1925	Wang's translation of s 241 BGB (1900) (Model)
By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance. (G.241). ³²	By virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance. ³³

Table 6 - 4: Comparison between the English draft of Article 194 of the Code of 1925 and its model

The meeting minutes of 18 August show that Chitr proposed that the first article of Book II on obligations should be copied from s 241 BGB. Unfortunately, there was no record of discussion as to why he chose this German provision. There was, however, a debate over the choosing of a model. Cazeau argued against copying s 241 BGB and suggested that the first article of the Thai obligations chapter should be better based on Article 399 of the Minpō,³⁴ which is the first provision of its Book III on obligations. The majority of the draftsmen voted in favour of Chitr's proposal.³⁵ The reason for adopting s 241 BGB may be that the Thai draftsmen needed a provision to define the term 'obligation', and this German provision seemed to meet the need. Unfortunately, the method of drafting deprived the draftsmen of the opportunity to explore the principles behind s 241 BGB as well as its implications on the concept of specific performance in German law. For this reason, we can guess the answer of the question above that the draftsmen intended to use s 241 BGB simply as the definition of the term 'obligations' in the Code of 1925 and therefore the draftsmen never saw any problem in having both conflicting rules of specific performance (s 241 BGB and Article 414 of the Minpō) in the same place. Without a systematic knowledge of this German provision, it is impossible to understand its true meaning hidden behind the letter of the law.

The drafting of Article 215 of the Code of 1925, the rule which established the right to compensation for damage, was even more mysterious than the drafting of Articles 194 and 213 of the same Code. On 24 August, upon the completion of the drafting of Article 213, the drafting committee began to discuss the formation of the next article, the present Article 215. The meeting minutes only contain one small paragraph of the discussion: 'the meeting had examined Section 286 of the German

³² 'Book of the Revised Drafts' 103.

³³ Wang, *German Civil Code* 55.

³⁴ Japanese Civil Code of 1898, art 399: 'Even a thing which cannot be valued (estimated) in money may be made the subject of an obligation' in De Becker, *Annotated Civil Code of Japan*, vol 2, 6.

³⁵ 'Meeting Minutes' (18 August 1925) 2.

Civil Code³⁶ and Article 956 of the Brazilian Civil Code³⁷ and agreed that both rules reflected the same principle. It therefore decided to draft the Thai provision based on them'.³⁸ [My translation] However, the draft of the provision attached to the meeting minutes of 24 August shows that the newly drafted rule was nearly a copy of s 286 BGB rather a combination of both foreign models.

21. The debtor shall compensate the creditor for any damage arising from his default.

If by reason of default the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance. (c/p. G.286; c/p. Br. 956.)³⁹

This original draft was later replaced by another draft. There is no record of when and how this change took place, but according to the Book of the Revised Drafts, the draft of Articles 194 to 225 submitted to the High Revising Committee on 8 September does not contain the original draft of provisional Article 21. In fact, the first paragraph of the draft provision was removed while the second paragraph was maintained and given the article number 216. A new provision appeared dealing with the right to damages arising from the debtor's default under the article number 215. On closer scrutiny, this new provision is almost a copy of De Becker's translation of the first part of Article 415. There are only a few linguistic alterations as shown in the following comparison table.

³⁶ BGB (1900), s 286: 'The debtor shall compensate the creditor for any damage arising from his default.

If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, demand compensation for performance. The provisions of 346 to 356 applicable to the contractual right of rescission apply *mutatis mutandis* in Wang, *German Civil Code* 65.

³⁷ Brazilian Civil Code, art 956: 'The debtor responds for the damages which his default may cause (art 1058)

Single Paragraph. If the prestation by reason of the default, becomes useless to the creditor, he may refuse to accept it (*engeital-a*) and require satisfaction of the losses and damage' in Joseph Wheless, *The Civil Code of Brazil* (Thomas Law Book Co 1920) 203.

³⁸ 'Meeting Minutes' (24 August 1925) 3.

³⁹ *ibid* 6.

Original English draft attached to the meeting minutes of 24 August 1925	Revised English draft in the Books of the Revised Drafts (as of 8 September 1925)	Model rules
<p>21. The debtor shall compensate the creditor for any damage arising from his default.</p> <p>If by reason of default the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance. (c/p. G.286; c/p. Br. 956.)⁴⁰</p>	<p>Article 215 When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damage caused there by. (c/p J.415)⁴¹</p> <p>Article 216 If by reason of default, the performance becomes useless to the creditor, he may refuse to accept it and claim compensation for non-performance. (c/p. G.286; c/p. Br. 956)⁴²</p>	<p>Minpō (1898), Article 415 When the debtor does not perform the obligation in accordance with the true intent and purpose of the same (<i>in forma specifica</i>), the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor. (In reference vide Art. 414; also Arts. 250, 286 and 325 of the German Civil Code.)⁴³ [De Becker tr]</p> <p>BGB (1900), s 286 The debtor shall compensate the creditor for any damage arising from his default. If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, demand compensation for performance. The provisions of 346 to 356 applicable to the contractual right of rescission apply <i>mutatis mutandis</i>.⁴⁴ [Wang tr]</p>

Table 6 - 5: Comparison between the English draft of provisional art 21, the English drafts of arts 215 and 216 and their foreign model rules

In addition to the questions about when and why Article 215 was adopted, another important question is who replaced the original draft with the draft of Article 215. There are two possible answers. It may have been Guyon because it was normal practice for the original drafts of the Code of 1925 discussed by the draftsmen to be sent to him for comment before being submitted to the High

⁴⁰ *ibid.*

⁴¹ 'Book of the Revised Drafts' 109.

⁴² *ibid.*

⁴³ De Becker, *Annotated Civil Code of Japan*, vol 2, 25.

⁴⁴ Wang, *German Civil Code* 65.

Revising Committee. However, it was also usual that Guyon's comments on the drafts would ultimately be discussed and approved by the drafting committee. Furthermore, the discussions as to his feedback were normally recorded in the minutes of the meetings. There is, however, no record of Guyon's comments on the adoption of Article 415 of the Minpō in the minutes of the meetings that took place between 24 August and 8 September. This suggests that he was not the person who introduced this Japanese article to the Code of 1925. It is more likely that Plod added Article 215 modelled on the Japanese Article 415 since he was responsible for the preparation of the final drafts approved by the drafting committee to be submitted to the High Revising Committee. The absence of an explanation for the adoption of the Japanese Article 415 meant the absence of an explanation of how Article 215 coexists with Article 213.

In examining the meeting minutes, some interesting facts have been discovered. First, the rules concerning breach of contract in the Code of 1925 were mostly copied from the BGB, but the rules which established the right to performance (Article 213) and the right to compensation for damage (Article 215) were copied from Articles 414 and 415 of the Minpō respectively. Second, the draftsmen adopted s 241 BGB, the base of the German concept of specific performance, to establish Article 194. Third, the manner in which the foreign rules were copied and the discussion about the drafting of Article 413 prove that the draftsmen did not have knowledge of the German concept of non-performance, especially the principle of the primacy of performance nor the difference between the French and German concepts of specific performance. This is clearly illustrated by the adoption of s 241 BGB without discussing the principle behind it. Plod's reliance on De Becker's information about the source of Article 414 adds more proof that he was not aware of the difference between specific performance and restitution in kind in German law despite the fact that Schuster's *The Principles of German Civil Law*, which he claimed to consult, clearly states this difference. He also seemed to have been unfamiliar with the German concept of specific performance. All these facts lead to one conclusion, that the draftsmen of the Code of 1925 uncritically copied foreign provisions to establish the rules concerning specific performance without a systematic knowledge of the rules that they adopted. The most important problem of the adoption of these provisions is that other than linguistic reasons the draftsmen of the Code of 1925, unlike the Japanese draftsmen, did not explain why the model rules were chosen and how they were conceptually linked to each other within the system of remedies for non-performance. This raises

a question of whether, as a result of legal borrowing, this drafting method affected Thai lawyers' understanding of specific performance.

2. CONCEPTIONS OF SPECIFIC PERFORMANCE IN THAI LAW

The review of the drafting process of the Code of 1925 shows how the foreign rules of specific performance were imported to the Thai legal system. However, codification alone does not provide the full picture of the reception process. To obtain a full understanding of how this foreign law has been assimilated into the Thai legal system, it is also necessary to examine Thai lawyers' theoretical and practical understanding of it through their publications and their judicial decisions. The assimilation of foreign legal rules is part of the reception process which Zentarō Kitagawa calls 'theory reception'.⁴⁵ It also illustrates the consequence of the codification or a result of legal borrowing. Although the focus of this research is on conceptual understanding of specific performance, it cannot completely ignore practical understanding, mainly judicial decisions. Practical understanding is also a main object of comparative law or in Rodolfo Sacco's terms a 'legal formant' of a comparative study.⁴⁶

2.1 Practical understanding

If one looks at the practical understanding of the concept of specific performance in general, one may find Hendrik Lando and Caspar Rose's observation convincing. Referring to the opinions of Ernst Rabel⁴⁷ and Korad Zweigert and Hein Kötz,⁴⁸ Lando and Rose suggested that the difference between the concepts of specific performance in the civil and common law systems or in German and French law is small in practice. The plaintiff usually seeks compensation for damage instead of performance.⁴⁹ For this reason, a comparative study of the practical application of

⁴⁵ Kitagawa, 'Japanese Civil Law' 32–36.

⁴⁶ Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 AJCL 1, 21–23.

⁴⁷ Ernst Rabel, *Das Recht des Warenkaufs: eine rechtsvergleichende Darstellung*, vol 1 (W de Gruyter 1936) 375.

⁴⁸ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 484.

⁴⁹ Hendrik Lando and Caspar Rose, 'On the Enforcement of Specific Performance in Civil Law Countries' (2004) 24 IRLE 437, 477–79.

specific performance in different systems may not produce a significant result in terms of differences. However, this is not a reason to ignore the practical understanding of this concept to see how it has been incorporated in Thai law.

As discussed in Chapter 3 above, the dominance of English law in Thailand, particularly at the Law School of the Ministry of Justice, during the transition period had a profound impact on the early development of Thai law. Most professional judges and lawyers educated at the Law School were students of English law and some of them continued to apply common law principles at Thai courts even after the Code of 1925 came into effect. According to Guenter Treitel, in English law, 'the normal remedies for breach of contract are the action for an agreed sum, where the breach consists of failure to pay such a sum, and the action for damages, where the breach consists of failure to perform some other obligations'.⁵⁰ Since specific performance was developed in the Court of Chancery, specific performance is an equitable remedy. It is a general rule that 'equitable remedies are not available as of right but at the discretion of the court'.⁵¹ It has been suspected that in some cases the Thai court applied this English principle.⁵² In a case of a purchase of land, the Supreme Court in 1926 rejected the plaintiff's claim to specific performance on the ground that it was inconvenient and difficult [for the Court] to determine the property boundaries. The court therefore awarded the plaintiff damages instead of performance.⁵³ This decision clearly contradicts the law which does not allow the court to exercise its discretion. Under Article 213, the court may award the plaintiff damages instead of enforcing performance if the nature of the obligation does not permit specific performance. However, in this case, the Court did not establish that to enforce performance was impossible or contrary to the nature of the obligation: it only perceived that the determination of the property boundaries was difficult. In another case in 1943, the defender agreed to supply gunnysacks to the plaintiff. The defender stopped delivering the goods as agreed. The plaintiff claimed for performance. The defender used the Second World War as his excuse: this was rejected by the Supreme Court on the grounds that the contract did not specify that the goods must be imported from foreign countries. However, the Court only awarded the plaintiff damages on the grounds that the plaintiff had received

⁵⁰ GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 63.

⁵¹ *ibid.*

⁵² Seni Pramroj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้* (Juristic Acts and Obligations in the Civil and Commercial Code), vol 2 (Aksornsarn 1966) 630.

⁵³ Supreme Court Decision No 506/2469. See also the Supreme Court Decision Nos 226/118 (2430 BE), 514/2469, 714/2469 and 632-33/2469; *ibid* 630-31.

gunnysacks from a third person since the defender breached the contract.⁵⁴ Again, the Supreme Court arbitrarily exercised its discretion to determine the remedy for non-performance despite the fact that the enforcement of performance was still possible.

Other than those unusual cases discussed above, the application and interpretation of the concept of specific performance in Thailand has generally been in line with the wording of Article 213. The Thai courts tend to follow the clear text of Article 213 para 4 that the enforcement of performance does not prejudice the creditor's right to damages and incline towards the mainstream theory⁵⁵ in Thailand that the creditor has the right to choose between specific performance and damages in lieu of performance, as implied in a number of Supreme Court Decisions, ie Supreme Court Decision No 1035/2475 BE (1932 AD) where the Court decided that in case of non-performance the plaintiff could seek both performance and damages.⁵⁶ The debtor can also choose between the enforcement of performance and termination of contract as stated in Supreme Court Decision No 331/2528 BE (1985 AD). But the Supreme Court in 2002 held that the plaintiff must choose between performance and rescission: if he chose the latter he could not resort to the former because there was no longer the contract as the basis of performance.⁵⁷

The aggrieved party's right to choose remedies for non-performance was however impeded by the Supreme Court in Case No 2625/2551 in 2008. This case provided the Court with an opportunity to clarify the relationship between remedies for non-performance, especially specific performance and damages. This is the first time that the Supreme Court has implicitly reviewed the aggrieved party's right to choose contractual remedies and therefore implied the principle of the primacy of specific performance. In this case, the Post and Telegraph Department lent a communication device to a company which agreed to pay the rent over the period it used it. The company breached the contract but sent a letter to the Department to terminate the contract. The Department agreed with the termination of contract and demanded that the company return the device. This was ignored. The Department then filed a complaint claiming either performance or the value of the price of the device (damages in lieu of performance). The Supreme Court judges held that as long as the performance was possible the plaintiff had no right to claim

⁵⁴ Supreme Court Decision No 815/2486.

⁵⁵ See 2.2 Conceptual understanding, below.

⁵⁶ Supreme Court Decision Nos 1035/2475. See also Supreme Court Decision Nos 2116/2553 and 2116/2553

⁵⁷ Supreme Court Decision No 510/2545.

damages instead of performance. Referring to Article 225 of the Code of 1925,⁵⁸ the judges ordered the defender to pay only the interest on the value of the devices from the default date.⁵⁹ Although it did not expound the principle of the primacy of performance, the Court attempted, to a certain degree, to clarify the ambiguous relationship between specific performance and damages under articles 213 and 215. Unfortunately, the judges in this case seem to have overlooked the fact that the contract had been rescinded before the case was brought before them. The effect of the termination of the contract should invalidate the claim for performance since there was no basis for contractual obligations (See Supreme Court Decision No 510/2545 above). Despite this flaw, this judgement is still interesting in the sense that the court seemingly upheld the primacy of specific performance. The Supreme Court in Case No 2625/2551 may have understood that it was safeguarding the principle of the primacy of specific performance which has been long expounded by Thai academics and that by rejecting damages in lieu of performance this principle was defended.

It is uncertain whether the decision will be followed by subsequent cases⁶⁰ and how much significance it has had on the study of specific performance since Thai writers do not usually raise issues of the relationship between specific performance and damages. The ambiguity in determining the right remedy for each case of non-performance and the scope of the right to compensation for damage in case of non-performance resulted from the blind copying of the Japanese Articles 414 and 415. Article 413 para 4 appears to confirm the equality between specific performance and damages. Article 415 only set up the general principle that the creditor has the right

⁵⁸ Code of 1925, art 225: 'If the debtor is bound to make compensation for the value of an object which has perished during the default, or which cannot be delivered for a reason which has arisen during the default, the creditor may demand interest, on the amount to be paid as the basis for the estimate of the value. The same rule applies if the debtor is bound to make compensation for the diminution in value of an object which has deteriorated during the default'. 'Book of the Revised Drafts' 113. This provision was a copy of the English translation of s 290 BGB (1900) by Chung Hui Wang in, *German Civil Code* 65–66.

⁵⁹ Supreme Court Decision No 2625/2551.

⁶⁰ Since the Thai legal system belongs to the civil law family, the principle of precedent does not exist and a court decision is not regarded as a source of law. It can only be an example of the application of a law, but it is a normal practice in the courts that a quality Supreme Court decision is followed by subsequent cases which have similar facts. Article 4 of the Code of 1925 establishes the sources of law in Thai civil law. It states that:

'the law must be applied in all cases which come within the letter or the spirit of any its provisions.

Where no provision is applicable the case shall be decided according to the local custom.

If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law'. This provision was drafted based on Section 1 of the Swiss Civil Code. See 'Book of the Revised Drafts', 14–15.

to claim compensation for damage on the condition that the debtor does not effect his performance. But it does not distinguish between damages in lieu of performance and damages in addition to performance.

Despite Supreme Court Decision No 2625/2551 BE, the creditor's right to choose between remedies as stated in Article 213 para 4, it is not convincing that the principle of the primacy of specific performance has been firmly established. Whenever they write a text on the law of obligations and attempt to conceptualise specific performance based on the principle of the primacy of performance, judges tend to produce contradictory statements as we will see below. This is because in cases of non-performance Article 213 para 4 clearly grants the creditor both rights to specific performance and damages concurrently and Article 415 gives the creditor the right to compensation for damage once the debtor fails to perform his obligations. The recognition of specific performance as the primary remedy of breach of contract therefore appears to contradict this provision. Pairoj Vayubhap,⁶¹ then Vice-President of the Supreme Court and Editor of the Thai Bar's Collection of Supreme Court Decisions of 2551, argued against Supreme Court Decision No 2625/2551. Pairoj neither raised the issue of the termination of the contract to reject the claim for performance nor maintained that specific performance was not available. He was in favour of damages but did not clearly explain why the creditor deserved the right to damages instead of the right to performance. To justify the claim for damages, Pairoj only commented on the judgement that 'under Article 215 the plaintiff had the right to claim compensation for damage, including the value of the price of the device, in case of non-performance'.⁶² This opinion implies that he views that the creditor has the right to choose between specific performance and damages and that Article 215 was the source of both the rights to damages in lieu of performance and damages in addition to performance. However, in his book on the law of obligations, Pairoj seemed to say otherwise. He interpreted the right to damages as stated in Article 213 para 4 as 'a supplementary remedy (มาตรการเสริม)' of the enforcement of performance.⁶³ Pairoj saw the right to damages as a separate obligation; it was a right arising from breach of contract, not part of the content of the original obligation. On the surface, this appears to be consistent with German

⁶¹ Pairoj Vayubhap (born 1950) is currently the President of the Supreme Court of Thailand. He was briefly a full-time lecturer of law at Thammasat University. Pairoj holds a LLB and LLD (Hon) from Thammasat and has taught at the Institute of Legal Education of the Thai Bar and Thammasat where he is a *professor extraordinary*.

⁶² Pairoj Vayubhap (ed), *คำพิพากษาศาลฎีกา* (Collection of Supreme Court Decisions of 2551), vol 6 (Thai Bar 2008) 1080–81.

⁶³ Pairoj Vayubhap, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้* (Commentary on the Law of Obligations) (Institute of Legal Education of the Thai Bar 2011) 183.

jurisprudence where specific performance is regarded as the primary right (*Primäranspruch*) and damages as the secondary right (*Sekundäranspruch*).⁶⁴

However, Piroj's explanation for the supplementary nature of damages in fact came from his observation on the wording of Article 213 rather than the German concept of non-performance; he observed that the right to damages was mentioned in the last paragraph preceded by three paragraphs which concern the enforcement of performance.⁶⁵ Unfortunately, Pairoj did not discuss the principle of the primacy of specific performance and the relationship between the two remedies, ie when damages in lieu of performance were available and how specific performance was supplemented by damages, in detail. This is a clear illustration of the problem of the interpretation of Articles 213 and 215 which seem to lack clear underlying principles.

In summary, in applying the rules relating to the concepts of specific performance and damages Thai courts did not clarify these concepts or their relationship other than deciding legal issues concerning Articles 213 and 215 raised by the parties. The development of the concept of specific performance and the clarification of these issues is the work of academics.

2.2 Conceptual understanding

There have been a number of academic works on the law of obligations since the promulgation of the Code of 1925. Compared to the number of publications of the same genre in Germany and Japan, there are far fewer books on this area of law in Thailand and only a small number of them have regularly been used in the teaching and studying of law in universities. This part of this chapter reviews a number of books published since the enforcement of the Code of 1925 to observe how the authors, most of whom held both academic and professional positions, understood the Code of 1925 provisions relating to specific performance and damages, especially Articles 194, 213, and 215. It focuses on the conceptualisation of specific performance and damages, and how these two remedies coexist as competing remedies for non-performance. The review of the publications is arranged mainly according to the educational background of their authors since this may provide clues as to whether in explaining Thai law they adopted the mainstream view from

⁶⁴ Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 398. See also Dagmar Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 140.

⁶⁵ Vayubhap, *Commentary* 183.

the country where they were educated. Unfortunately, there have been no texts on the general principles of the Thai law of obligations published by those who were educated in Germany or in line with German jurisprudence.

2.2.1 The works of members of the drafting committee of the Code of 1925

There is no official commentary on Books I and II of the Code of 1925 produced by the drafting committee. However, Abhai Raja, then Minister of Justice and President of the Committee of Legislation, assigned Guyon, de Planterose and Cazeau to produce examples of each provision of the Code of 1925 in English language and Phra Pinijpojanat⁶⁶ to translate their work into Thai.⁶⁷

The only commentary on the Code of 1925 produced by a member of the drafting committee is *Commentary on Articles 1 to 240 of Books I and II of the Civil and Commercial Code* written by Boonchoi and published by the Bar Council of Thailand in 1933. It was last reprinted in 1960. Interest in this work revived after Thammasat University faculty of law assigned some of its academics to edit it and the new edition was eventually published in 2012. One interesting feature of this commentary is its comparative notes: in addition to commentary on each article, Boonchoi, for comparative purposes, provided a list of foreign provisions which were either conceptually or linguistically similar to the Thai rule in question. He did not claim that they were used by the draftsmen as the models for the Code of 1925 provision.⁶⁸ However, his referencing suggests that he consulted the Book of the Revised Drafts of the Code of 1925, which clearly specifies the source of each provision, because each of his foreign law references mostly matches with the drafting committee's references despite the fact that his often extended to other relevant foreign provisions.

Boonchoi explained that Article 194 of the Code of 1925, a copy of s 241 BGB, was implicitly the definition of the term 'obligation' and described the creditor's right to claim performance arising from both contractual and delictual obligations.

⁶⁶ An official of the Department of Legislative Redaction and the Committee of Legislation, who on Plod's instructions translated some English drafts of the Code of 1925 into Thai before they were submitted to the High Revising Committee.

⁶⁷ See Phraya Manavarajasevi, *คูหาหรับสำหรับประมวลกฎหมายแพ่งและพาณิชย์บรรพ 1-2 ฉบับกรร่างกฎหมายและที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์บรรพ 1-5* (Department of Legislative Drafting's Instances of Books I and II of the Civil and Commercial Code and Sources of the Provisions of Books I, II, II, IV, and V of the Civil and Commercial Code) (Bangkok University 1990).

⁶⁸ Phraya Devitoon Pahoolsarutabordi, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-2 มาตรา 1 ถึง 240* (Commentary on Articles 1 to 240 of Books I and II of the Civil and Commercial Code) (Bar Council of Thailand 1933) ข.

He referred this provision to s 241 BGB.⁶⁹ On Article 213, which concerns the creditor's right to compulsory performance, Boonchoi explained that it was the first provision concerning a remedy for non-performance. On the first paragraph of the provision, which states: 'if the debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance; except where the nature of the obligation does not permit it', he commented that an essential aim of the law of obligations was to help enforce performance according to the nature of the obligation and '[t]herefore, the first and normal remedy for non-performance is specific performance.' [My translation] He related this provision to Article 194 of the same code.⁷⁰ However, on Article 213 para 4, which read: 'the provisions of the foregoing paragraphs do not affect the right to claim damages', he explained that the creditor's right to specific performance did not prejudice his right to claim damages. Boonchoi provided three possible situations where the right to claim damages is available. The first situation is where it is not possible to enforce performance or where the enforcement of performance is fruitless. The second situation is where, despite the possibility of the enforcement of performance, the creditor wishes to claim damages instead of performance. The last situation is where the creditor claims damages in addition to the enforcement of performance since the performance alone is not sufficient to cover the creditor's loss.⁷¹ It is worth noting that all three situations seem to be peculiar to breach of contract and Boonchoi did not give any illustration of how a delict or restitution in kind could be included in the given situations. In his comparative note on Article 213, he links this provision to Article 414 of Minpō, Articles 1143 and 1144 of the French *Code civil* and Section 98 of the Swiss Code of Obligations.⁷²

On Article 415, Boonchoi commented that this provision constituted the creditor's right to demand either 'compensation' or 'damages' [my translation] in case of non-performance. There is, however, no clear explanation as to the distinction between these two terms. He explained that Article 215, which is consistent with the last paragraph of Article 213, concerned the cases where the debtor did not perform his duty, and extended to the cases where the debtor's performance is imperfect, including a delivery of defective goods, delayed performance, a delivery of the good to the wrong place. Boonchoi linked Article 215

⁶⁹ *ibid* 703–04.

⁷⁰ *ibid* 766–67.

⁷¹ *ibid* 771–73.

⁷² *ibid* 773.

to Article 415 of the Minpō, Article 1142 of the French *Code civil* and Article 97 of the Swiss Code of Obligations.⁷³

Having considered Boonchoi's commentary on Articles 213, it is interesting to observe that he did not connect this article to any provision of the BGB as did the Book of the Revised Drafts of the Code of 1925 to which ss 249 and 251 BGB were referred. Other than Japanese law, he referred to Articles 1143 and 1144 of the *Code civil* and s 98 of the Swiss Code of Obligations. This is interesting because there was no discussion as to French and Swiss law models in the drafting of Thai Article 213. The Thai draftsmen simply copied most of the texts of De Becker's translation of Article 414 of the Minpō. The question arises why Boonchoi did not rely on the information in the drafting minutes and the Book of the Revised Drafts, products of his own labours, to count the two German provisions as the model of Article 213. As discussed in Chapter 5 above, it was later discovered that the Japanese Article 414 was product of French and, not German law. Furthermore, it must be asked when and how Boonchoi discovered this given that he never raised this suspicion nor challenged the reference to the BGB provisions during the codification process. The explanation might be that after conducting a comparative study of Thai, Japanese, German and French law, perhaps some years later, Boonchoi found no connection between Article 213 of the Code of 1925 and ss 249 and 251 BGB either linguistically or conceptually but instead discovered the similarity between the Thai and French provisions. If this is the case, then one can see the weakness of uncritically copying of foreign law. Instead of thoroughly studying the foreign rules before borrowing them, the draftsman had to conduct research himself on the rules that he had already adopted. Whether Boonchoi was aware that he had discovered the genuine sources of Article 213 later is not known. He never publicly raised doubts about De Becker's references to the BGB or the reference notes of the English drafts of the Code of 1925 many of which were copied from De Becker's references.

Another interesting point is that Boonchoi did not give an example of how Article 213 was applicable to delicts despite the fact that the draft of Article 213 in the Book of Revised Drafts clearly states that the provision includes restitution in kind and is connected to BGB ss 249 and 251⁷⁴ and that Plod's proposal to change the term from 'specific performance' to 'compulsory performance' in the draft of Article 213 aimed to include the case of restitution in kind.⁷⁵ In fact, his instances of Article 213 only concern breach of contract.

⁷³ *ibid* 778-81.

⁷⁴ 'Book of the Revised Drafts' 109.

⁷⁵ 'Meeting Minutes' (27 August 1925) 3.

Boonchoi's commentary on Articles 213 and 215, especially with regard to primary remedies for non-performance, are mostly in line with De Becker's commentaries on Articles 414 and 415 of the Minpō. However, while De Becker clearly submitted that in the case of non-performance, there were two remedies available to the creditor, namely to enforce performance and to demand compensation for damage, Boonchoi commented on the first paragraph of Article 213 that it reflected the creditor's 'first and normal remedy' for non-performance, the right to enforce performance. This proposition appears to contradict his own subsequent commentary of the last paragraph of the same provision, in which he provided three possible cases of the availability of the creditor's right to demand damages. One of them is where the debtor can choose to demand damages despite the fact that performance is still possible to be enforced. This casts doubt on his view on the relationship between specific performance and damages. The question is how specific performance can be regarded as the creditor's 'first and normal remedy' for non-performance where, concurrently, the law gives him an alternative remedy, to demand damages, despite the feasibility of the former.

2.2.2 The works of French-educated Thai academics

In Thailand, a number of authoritative books on the law of obligations were written by Thai academics who were educated in France. Padoux's proposal for a reform of legal education of Ministry of Justice's Law School to facilitate codification and the emerging code system in Thailand and the French Government's request for appointing Frenchmen to Law School to take charge of the curriculum reform and legal education in 1925 received a positive response from the Siamese government. This led to the emergence of French jurisprudence as English law's equal rival at Siam's only law school and the end of Britain's monopoly of the Thai's overseas legal education. The Ministry of Justice began to send Thai law students to be educated in France, for example Pridi Banomyong in 1920 and Sahad Suthan in 1923.⁷⁶ Pridi, the civilian leader of the 1932 Revolution, founded Thammasat University in 1934. It was the only university which offered law degrees in Thailand until 1971. As its first president (1934-52), Pridi set up the university law curriculum modelled on European legal education and employed several French-educated Thai

⁷⁶ Chanchai Sawaengsak, *อิทธิพลของฝรั่งเศสในการปฏิรูปกฎหมายไทย* (French Influence on the Reforms of Thai Law) (Nititham 1996) 64–66.

as well as some French professors to teach at the University.⁷⁷ The establishment of Thammasat University marked the end of the dominance of English law in Thailand and saw French law's increasing popularity. (See Chapter 2, 3.2 'Legal Education')⁷⁸

Pridi, though renowned as the father of public law in Thailand, was *docteur en droit* from Paris and wrote his doctoral thesis on private law. He wrote several law books, including a commentary on Book II of the Code of 1925 published in 1929. On the first provision of Book II, a copy of s 241 BGB, he commented that by virtue of Article 194 the creditor had rights to have the obligation fulfilled by the debtor. However, he explained that the kinds of rights the creditor was entitled to were specified in Part I of Non-Performance. Pridi saw the second sentence as a separate part of the provision which he explained concerned the three types of obligations classified by the nature of the object of obligations, namely obligations to do and not to do something and obligations to transfer properties, including money.⁷⁹

Pridi's brief comments on Article 213 are associated with the nature of the object of obligations. He submitted that there was only one type of obligation, namely the obligation to transfer property including pecuniary obligations, whose nature permits compulsory performance. Pridi explained that the nature of obligations to do and not to do something did not allow the creditor to demand performance from the debtor without his consent. The creditor therefore needed to seek alternative methods to have the obligation fulfilled as provided by the subsequent paragraphs of Article 213. He added that under the last paragraph (para 4) of the same provision the creditor also had the right to claim damages in addition to the remedies mentioned earlier.⁸⁰ However, Pridi neither provided a commentary on Article 215 nor clarified how it is linked to Article 213 para 4 concerning the creditor's right to damages. He only gave one example which illustrates the creditor's right to demand compensation for damage. His example concerns the situation where the debtor delivers a white car instead of a yellow car as specified in the contract to the creditor. Pridi concluded that the debtor did not perform his obligation in accordance with the true intent and purpose of the obligation.⁸¹

⁷⁷ Charnvit Kasetsiri, 'ปรีดี พนมยงค์กับมหาวิทยาลัยธรรมศาสตร์และการเมือง (Pridi Banomyong and the University of Moral and Political Sciences)' in Thamrongsak Petchlertanan (ed) 'ปรีดี วิวาทกับธรรมศาสตร์และการเมือง (Pridi and Puey and the University of Moral and Political Sciences)' (Thammasat University Archive 2006) 10-30.

⁷⁸ p 77 above.

⁷⁹ Pridi Banomyong, *ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 2* (Commentary on Book II of the Civil and Commercial Code), vol 1 (Nitisan 1929) 24-25.

⁸⁰ *ibid* 63-65.

⁸¹ *ibid* 67.

Pridi's commentary on and examples of the Thai provisions regarding the right to specific performance and compensation for damage obviously reflects French jurisprudence in which there is a distinction between obligations according to both their nature and the remedies for non-performance are explained according to this division. It is not clear whether Pridi recognised specific performance as the primary remedy for non-performance. However, his commentary on Article 194 can lead one to suspect that he did not consider specific performance as the first and normal remedy for non-performance due to his view that the creditor's rights to have the obligation fulfilled under Article 194 are determined by the non-performance provisions.⁸² This implies that the creditor may have the obligation fulfilled by demanding either specific performance or compensation for damage as prescribed by Article 213.

Pridi's view on Article 194 was shared by another prominent professor, another doctor of law from Paris, Serm Vinijchaikul,⁸³ who wrote a comprehensive book on the law of contract and obligations. Serm submitted that Article 194 lays the foundations for three main rights of the creditor, namely the right to enforce specific performance either in case of obligations to do or not to do something, the right to demand compensation for damage in case of non-performance and delayed performance, and the right to take measures to protect the debtor's properties for the creditor's own security.⁸⁴ Article 194, a copy of s 241 BGB, was interpreted widely to include even compensation for damage. Serm defined non-performance narrowly as the situations where the debtor did not perform his duty 'at all' and where the performance was imperfect. He contended that for the former situations whether the creditor was able to seek compensation for damage was determined by the nature of the obligation. If the nature of the obligation permitted specific enforcement, then the creditor needed to follow the methods prescribed by Article 213. In case of pecuniary obligations, the creditor needed a court order to enforce the creditor's assets while in case of obligations to do something which did not require exclusively the debtor's performance, the creditor may apply to the court to have the obligation fulfilled by a third party at the debtor's expense. Serm explained

⁸² *ibid* 24.

⁸³ Serm Vinijchaikul (1907-85) was former Secretary General of the Council of State (former Department of Legislative Redaction) between 1946 and 1953, Governor of the Bank of Thailand between 1946 and 1955, Permanent Secretary of the Ministry of Finance between 1954 and 1965 and Minister of Finance between 1957 and 1973. He taught at Thammasat University as a professor from the beginning (1934) and was appointed as the first Dean of the Faculty of Commerce and Accountancy at Thammasat in 1981.

⁸⁴ Serm Vinijchaikul, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ลักษณะนิติกรรมและหนี้* (Commentary on the Civil and Commercial Code with Reference to Juristic Acts and Obligations) (Excise Department Press 1972) 144.

that only situations where the creditor did not benefit from the remedies prescribed by Article 213 could lead to compensation for damage. These situations were always related to obligations whose true intent and purpose required the debtor to perform his duty exclusively.⁸⁵ By contrast, delayed performance could always lead to compensation for damage as long as three requirements were met, namely the default of the debtor, damage caused by delayed performance and the debtor's responsibility for it.⁸⁶

Among the books on the law of obligations written by Thai scholars educated in France, the most popular and arguably most authoritative is that of Jeed Setthabutr,⁸⁷ *The Principles of the Law of Obligations* (หลักกฎหมายแพ่งลักษณะหนี้),⁸⁸ which was published in 1969 and is now in its twentieth edition. In this academically well-respected study, Jeed explained that Article 194 confirmed the right and the duty of the creditor and that it proved that an obligation in the legal sense was distinguished from a moral obligation.⁸⁹ However, referring to the Roman legal principle *impossibilium nulla obligatio est*, he added that the debtor was exempted from performing his duty in case of impossibility of performance. Apparently influenced by another principle of Roman law, Jeed considered natural obligations (*obligationes naturales*), for example gambling and extinctive prescription, as another exemption of Article 194.⁹⁰

Jeed put Article 213 under the head of the enforcement of performance and contended that in order for the creditor to enforce performance two requirements must be fulfilled, first his claim being due and, second, the debtor failing to perform his duty where he is not benefited from impossibility of performance.⁹¹ It follows that the debtor had the right to specific performance except where the nature of the obligation does not permit it. As several French-educated authors did, he clarified that the enforcement of performance was determined by the nature of the object of obligations, namely obligations to do and not do so something and obligations to

⁸⁵ *ibid* 155.

⁸⁶ *ibid* 157.

⁸⁷ Jeed Setthabutr (1906-95), a doctor of law from France, was a Thai judge between 1933 and 1947 before being transferred to the Ministry of Justice where he served as ambassador to a number of foreign countries. Jeed was also a law professor at Thammasat University and authored several books mainly on private law.

⁸⁸ The first edition was entitled 'Commentary on Juristic Acts and Obligations' (คำอธิบายนิติกรรมและหนี้) and published by the Institute of Legal Education of the Thai Bar in 1969. It was later edited by professors of Thammasat University and separated into two volumes, one on juristic acts and the other on obligations.

⁸⁹ Jeed Setthabutr, *หลักกฎหมายแพ่งลักษณะหนี้* (The Principles of the Law of Obligations) (20th edn, Thammasat University Faculty of Law 2011) 24.

⁹⁰ *ibid* 25-28.

⁹¹ *ibid* 48-49, 54.

give something.⁹² This explanation apparently reflects French jurisprudence. Regarding the right to damages, Jeed explained that by virtue of Article 213 para 4 the creditor had the right to claim damages where there was a breach of contract. He divided non-performance into three situations, namely where the debtor does not perform his duty at all, where the performance does not accord with the true intent and purpose, and where the performance is delayed. Jeed was the first author to explain expressly that the creditor's right to damages under the last paragraph of Article 213 was limited to contractual obligations. He reasoned that the remedies for delicts were specifically dealt with in the separate part of the Code.⁹³ Another reason may be related to difference in the uses of the terms in Article 213 and its relevant provisions. While the term 'the right to claim damages' (ค่าเสียหาย) is used in Article 213 para 4, the other relevant provisions, for example Article 215, as well as the provisions relating to delicts used 'compensation for damages' (ค่าสินไหมทดแทน). Both terms were also translated into the Thai language differently. It is possible that Jeed interpreted the former as 'pecuniary damages', whose meaning is not broad enough to include all remedies available for delicts. It should be noted that in De Becker's translations of the Japanese Articles 414 and 415, which were adopted as the model of Thai Articles 213 and 215 respectively, the same term 'compensation for damages' were used, but the Thai draftsmen slightly changed De Becker's terms: in the English draft of Article 213 they used the term 'the right to claim damages' while in the English draft of Article 215 the term 'claim compensation for any damage' (See Table 6-3 above).⁹⁴ The translators may have thought that because of their slight linguistic difference these two terms represented different principles and therefore translated them into Thai differently. This illustrates problems with legal borrowing and translation

In his commentary, Jeed did not clarify how the creditor's right to specific performance coexisted with the right to compensation for damage, particularly whether the creditor's right to damages or compensation for damage is an alternative to specific performance or a supplementary measure of it. He also did not explain how Article 215, which gives the creditor the right to claim compensation for damage where the performance is not in accordance with the true intent and purpose of the obligation, was applied and interpreted and how it was connected to the right to damages under Article 213 para 4.

⁹² *ibid* 59-60.

⁹³ *ibid* 65.

⁹⁴ pp 183-85 above.

Daraporn Tirawat,⁹⁵ the most recent and longest-serving editor of Jeed's book, clarified the interpretation and application of Article 215 in her own book on the law of obligations published in 2011. Daraporn did this by relating it to the German concept of positive breach of contract. She puts Article 215 under the head of the debtor's liability for non-performance, which is divided into two sub-topics, general liability and specific liability. Daraporn saw Article 215 as the reflection of the general liability and submitted that this provision laid down the concept which is comparable to the concept of positive breach of contract. However, Daraporn extended it to encompass all kinds of non-performance, including defective performance, delayed performance and misplaced performance.⁹⁶ According to Daraporn, specific liability was certain kinds of extraordinary liability which resulted from delayed performance. For example, the debtor is liable for the impossibility of performance caused by an accident during his default (Article 217).⁹⁷

Daraporn's reference to the German concept of positive breach of contract is relatively unusual given her French educational background and her book's general adherence to French jurisprudence. However, it is worth repeating that while the authors of German and Japanese law of obligations usually considered positive breach of contract as the third category of non-performance in addition to impossibility of performance and delayed performance, Daraporn included all kinds of non-performance within the purview of Article 215, her analogous concept of positive breach of contract.

Daraporn dealt with the relationship between the creditor's right to specific performance and right to compensation for damage, under the heading of the enforcement of obligations. She proposed that in case of non-performance, the creditor can, through the court, enforce performance or demand for compensation for damage. According to Daraporn, the enforcement of performance depended on the types of obligations and this varies according to their nature, namely obligation to do or not to do and obligation to give. She explained that in addition to the enforcement of performance the creditor was entitled to claim compensation for

⁹⁵ Daraporn Tirawat is a professor at Thammasat University Faculty of Law and a lecturer at the Institute of Legal Education of the Thai Bar teaching mainly contract law and the law of obligations. She holds a LLB from Thammasat and a doctor of law degree from Aix Marseille.

⁹⁶ Daraporn Thirawat, *กฎหมายหนี้: หลักทั่วไป* (The Law of Obligations: General Principles) (Thammasat University Faculty of Law 2011) 60–61.

⁹⁷ *ibid* 63.

damage.⁹⁸ However, she did not clarify whether the creditor could choose the latter without exhausting the former.

2.2.3 The works of English-educated Thai academics

The earliest comprehensive commentaries on Book II produced by a Thai academic educated in the English common law system is Boonchoi's work published in 1933 and discussed at 2.2.1 above. There is another important work published a few years later by Seni Pramoj.⁹⁹ While Boonchoi's publication deals with partial Book II article by article, Seni's colossal two-volume work 'The Civil and Commercial Code concerning Juristic Acts and Obligations' (ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้) systematised the entire law of obligations, including the law of contracts.¹⁰⁰ His work is the most elaborate commentary on the Thai law of obligations. Unfortunately, it has not been updated or reprinted for decades.

Despite being educated in England, Seni generally explained the law of obligations in accordance with French jurisprudence. He treated Article 194 as the definition of the term 'obligation'.¹⁰¹ He contended that although this provision does not separate obligations into deferent types, the distinction between obligations to give, obligations to do and not to do is recognised in other provisions, notably Article 213.¹⁰² Seni explained Article 213 as a rule which reflected the French legal principle *L' exécution en nature* as opposed to the principle *L' exécution par equivalent*. He explained:

The general principle of the law of obligations is that the debtor must perform exactly what he promised. He cannot simply choose to pay damages instead of performing his duty...The creditor's right to specific performance...is therefore a normal execution while his right to compensation for damage is an abnormal execution which can be resorted to only when the enforcement of performance is impossible or when the creditor does not wish to enforce the performance.¹⁰³ [My translation]

⁹⁸ *ibid* 73-75.

⁹⁹ Seni Pramoj (1905-97) was Thai Prime Minister (1945-46 and 1975-76), judge (1929-40), Thai ambassador to the USA during the Second World War and *professor extraordinarius* at Thammasat University from its foundation. In 1962, he led the advocates representing Thailand in the ICJ case Temple of Preah Vihear (*Cambodia v Thailand*). Seni held a BA (honours) from Oxford and was called to the Bar at Grey's Inn ranked first in his class.

¹⁰⁰ This has around two thousand pages.

¹⁰¹ Seni Pramoj, *ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้* (Juristic Acts and Obligations in the Civil and Commercial Code), vol 1 (Aksornsarn 1966) 359.

¹⁰² *ibid* 378.

¹⁰³ Seni Pramoj, *Juristic Acts and Obligations*, vol 2, 627.

Seni noted that the Code of 1925 dealt with specific performance and damages on substantive level while their procedural sides were dealt with in the Code of Civil Procedure.¹⁰⁴ This comment does not agree with the noticeably procedural orientation of Article 213. It also contradicts with Seni's own terms, 'normal execution' and 'abnormal execution'.

Seni gave a contradictory commentary on Article 215 in saying that:

Although specific performance is still possible, either because the creditor no longer wishes it or he cannot enforce the performance because of his own fault, he can claim compensation for damage for non-performance. There is no provision in the Code forcing the creditor to exhaust specific performance. In case of non-performance, the creditor can choose damages over specific performance. The word 'may' (มีสิทธิ์) used in Article 213 [the creditor 'may' make a demand to the Court for compulsory performance] clearly denotes the creditor's right to choose.¹⁰⁵ [My translation]

In interpreting this text, Seni focused on its literal meaning rather the principle behind the rule or its historical development. More importantly, this explanation contradicts his earlier comments on Article 213 that specific performance is 'normal execution' while damages 'abnormal execution'. If the creditor has the right to choose between specific performance and damages, a question arises as to how specific performance can still be regarded as normal execution. Seni's adherence to the letter of the law, can also be illustrated by his attempt to make a distinction between Articles 213 and 215 by making an issue out of two different phrases 'fail to perform' used in Article 213 and 'does not perform' used in Article 215. Instead of investigating the origins of these two provisions, he interpreted them based on their linguistic difference.¹⁰⁶

A book published by an English-educated jurist on the law of obligations whose popularity and authority is comparable to that of Jeed is that of Sophon Rattanakorn,¹⁰⁷ an eminent Thai judge and academic. While Jeed conceptualised the law of obligations mainly in accordance with French jurisprudence without justification for doing so, Sophon was the first and only author in the same field who seriously employed a comparative method in writing his book. In

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid* 634.

¹⁰⁶ *ibid* 636-37.

¹⁰⁷ Sophon Ratanakorn is former President of the Supreme Court of Thailand between 1990 and 1991 and currently Advisor to the Supreme Court. He was a professional judge who spent almost four decades at Thai courts. He also taught at the Institute of Legal Education of the Thai Bar and Thammasat University, where he was appointed as a *professor extraordinary*. Sophon holds his first LLB from Thammasat and second LLB from the University of London. He was called to the bar at Gray's Inn.

propounding each concept of the law of obligations under the Code of 1925, he compared between German, French and English law and sometimes their Roman origin informing the reader of the position of the Thai law. Although Sophon did not usually bring up the discussion of the drafting committee when explaining a concept of obligation, he sometimes referred to the model rules of some Thai provisions and some publications that the Thai draftsmen consulted in the drafting process, for example Schuster's *The Principle of German Civil Law*, De Becker's *Annotated Civil Code of Japan* and Planiol's *Treatise on the Civil Law*.¹⁰⁸ His book suggests that Sophon reviewed the drafting process of the relevant provisions to a certain degree but did not trace them back through the historical development of their model rules.

Sophon saw the types of obligations, which he called 'the object of obligation'¹⁰⁹ (obligations to give and obligations to do and not to do) as one of the three essential elements of obligations, namely the subjects of obligation (the creditor and debtor), the object of obligation and legal bindingness.¹¹⁰ He dedicated a chapter to discussion of this topic as other Thai authors usually did. Sophon clearly explained that the distinctions between obligations had been discussed since Roman times and later written down in the French *Code civil* and why this subject is important for the study of the Thai law of obligations.¹¹¹ Despite the draftsmen's use of the heading 'the subject of obligation' (or in Sophon's terms 'the object of obligation'), the Code of 1925 did not explicitly adopt French law's division of obligations. As Seni pointed out, Article 194, a copy of s 241 BGB, mentions obligations not to do something not for the purpose of taxonomy but for emphasis on the scope of the creditor's right.¹¹² However, the existence of Article 213 means that the division of obligations may make it easier for the Thai scholars to identify the situations where the nature of an obligation does not permit compulsory performance.¹¹³

Under the heading of the effect of obligations, Sophon considered Article 194 as the source of the creditor's right to claim performance and on the other hand the source of the debtor's duty to effect the performance. He contended that as the

¹⁰⁸ Sophon Rattanakorn, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (Commentary on the Law of Obligations of the Civil and Commercial Code: General Provisions) (10th edn, Nitibannakarn 2010) 22–23.

¹⁰⁹ Seni used the English term 'the subject of obligation'. See Seni, *Juristic Acts and Obligations*, vol 2, 380.

¹¹⁰ Rattanakorn, *Law of Obligations* 42–43.

¹¹¹ *ibid* 61–65.

¹¹² Pramoj, *Juristic Acts and Obligations*, vol 2, 378–79.

¹¹³ *ibid*; Rattanakorn, *Law of Obligations* 65.

creditor had the right to claim performance, there were three considerations as to the debtor's duty. First, the debtor must perform his duty in accordance with the object of obligation. Second, the debtor must offer performance which is actually tendered to the creditor in the manner in which it is to be effected (Article 208 para 1).¹¹⁴ Lastly, as stipulated by Article 215, the debtor must perform his duty in accordance with the true intent and purpose of the obligation otherwise he must pay damages.¹¹⁵ It is worth observing that Sophon fused Article 194, whose model rule, s 241 BGB, has been understood as the source of specific performance in German law, with Article 215, the source of the competing remedy. However, this is hardly surprising since some other Thai authors held the same view.¹¹⁶

Sophon's most interesting view on the concept of specific performance is contained in his fourth and fifth chapters where he extensively discussed the creditor's rights to claim performance and to demand compensation for damage respectively. In his Chapter 4, he submitted that there were two issues about when the creditor could demand performance and how he could enforce performance. The first issue concerns time of performance while the second mainly Article 213. The latter is subdivided into three topics, the creditor's right to demand performance in general, the methods for enforcing performance and the court's power to enforce performance.¹¹⁷ Only the first two topics deserve attention here. As to the first sub-topic, Sophon briefly discussed the creditor's right to demand performance in general in three foreign legal systems, English law, French law and German law before providing a short analysis of the Thai system. He wrote:

Our Article 213 originated from [Article 414 of] the Civil Code of Japan, which refers to Sections 249 and 251 of the German Civil Code. Nevertheless, the wording of the third paragraph of it is close to Article 1143 of the French Civil Code. **We can say that our system generally follows German law.** [My emphasis] By virtue of Articles 194, 208, 213 and 320 of the Thai Civil and Commercial Code, the debtor is entitled to claim specific performance except where the nature of the obligation does not permit it. It follows that the creditor must seek damages instead.¹¹⁸ [My translation]

Sophon's understanding of the origin of Article 213 most likely came from the list of sources written in the English draft of the provision (known as Plod's List of

¹¹⁴ Article 208 para 1 is a copy of s 294 BGB (1900). It states: 'the performance must be actually tendered to the creditor in the manner in which it is to be effected'.

¹¹⁵ Rattanakorn, *Law of Obligations* 99.

¹¹⁶ See eg Vinijchaikul, *Commentary on Juristic Acts and Obligations* 144.

¹¹⁷ Rattanakorn, *Law of Obligations* 127–32.

¹¹⁸ *ibid* 135.

References). As discussed in Chapter 5 above, this list was inspired by De Becker's reference of Article 414 of the Minpō where he referred the Japanese provision to ss 249 and 251 BGB. This reference has been proved to be misleading. (See Chapter 5, 1.2.3 'The tracing of De Becker's Annotated Civil Code of Japan')¹¹⁹

Despite claiming that the Thai system of specific performance belongs to the German family, Sophon admitted that in effect the creditor instead of claiming performance may demand damages.¹²⁰ His comments on the creditor's right to demand compensation for damage in his Chapter 5 clearly justify this practice.

Generally speaking, the creditor is entitled to demand compensation for damage when the debtor fails to effect the performance...Despite the fact that the debtor has fulfilled his duty, the creditor may claim compensation for damage in addition to the performance if it is imperfect, incomplete or delayed causing damage to the creditor. In other words, to demand compensation for damage is either an alternative or supplement to the enforcement of performance.¹²¹ [My translation]

If compensation for damage as a remedy for non-performance is an alternative to specific performance in Thai law as Sophon suggested, can we still consider the latter to be the primary remedy for non-performance and that the Thai concept of specific performance follows the German system? Sophon did not discuss when and how the right to damages could substitute the right to performance in detail. Other than referring to Article 213, he did not provide any further explanation for why the Thai concept of specific performance belonged to the German family. This question has remained unanswered.

CONCLUSION

The examination of the drafting of the rules of specific performance and their relevant provisions confirms the findings of Chapter 3, namely that the draftsmen uncritically copied foreign provisions without a systematic knowledge of the rules they copied. They adopted three main provisions, s 241 BGB and Articles 414 and 415 of the Minpō, and used these to create Articles 194, 213, and 215 respectively without investigating their origins or underlying principles. This led to conceptual conflicts between rules and their interpretations. While most of Thai jurists have

¹¹⁹ p 159 above.

¹²⁰ Rattanakorn, *Law of Obligations* 135.

¹²¹ *ibid* 150.

recognised specific performance as the first and normal remedy for non-performance, most of them have simultaneously observed the text of Article 213 para 4 that the right to performance does not prejudice the right to damages. Unfortunately, most commentators on the Code of 1925 did not seem to be interested in tracing the origins of the Thai provisions and their foreign model rules. In interpreting the rules of specific performance, they either relied on Plod's List of References to the foreign sources of the Code of 1925 or their familiar foreign jurisprudence. It seems in analysing the drafting of the Code of 1925 from interpreting its rules, comparative law and legal history have not yet been fully used. This case study of specific performance has provided a chance to observe that legal borrowing without a systematic knowledge of the rules borrowed has some important implications for the development of the rules borrowed. Because Articles 194, 213 and 215 are not logically in harmony with the other non-performance provisions which were mostly modelled on the BGB, Thai judges and academics have found it difficult to justify the principle of the primacy of specific performance. Despite accepting this principle, the wording of Articles 213 and 215 has forced them to arrive at the conclusion that in case of non-performance the creditor has the right to choose between performance and damages. In doing so, they are at a loss to explain how the primacy of specific performance can be upheld when the creditor is given such right to choose.

CONCLUSION

1. THE MAKING OF THE CIVIL AND COMMERCIAL CODE OF 1925 AND THE RULES CONCERNING SPECIFIC PERFORMANCE

This thesis has discovered that there were flaws in the drafting of the Civil and Commercial Code of 1925 ('Code of 1925'). These flaws concerned the method the draftsmen adopted and sources they consulted. Most fundamental was Plod's belief that the Japanese Civil Code of 1898 ('Minpō of 1898') was a copy of the BGB of 1900. This misconception and its consequences were illustrated by the case study of specific performance.

The Japanese method: a fundamental flaw

There is no definite proof of the Thai government's policy change to adopt the BGB of 1900 in drafting the new code in 1925. However, Plod's interviews between 1980 and 1981 referred to the Pandectist system as both his and the King of Siam's favoured choice to replace the French system¹ as well as to René Guyon's letter to Siam's Minister of Justice in 1925 opposing the adoption of German law instead of French law.² These strongly convince that the cornerstone of the Code of 1925 in both the contents and structure was the BGB. The Thai draftsmen's adherence to the German Code and their rare adoption of French provisions during the drafting process also confirm this conclusion. Why did the draftsmen adopt the Minpō of 1898 as another principal model when they could have directly copied the English translation of German provisions? The answer is twofold. First, like many legal comparatists, Plod was misled by the mainstream belief that the Minpō was a

¹ Phraya Manavarajasevi, บันทึกคำสัมภาษณ์พระยามานวราชเสวี (Transcript of the Interviews with Phraya Manavarajasevi) (Thammasat University 1980) 4, 13.

² National Archive of Thailand, Office of the Council of State Doc No 9, 'Note of the Department of Legislative Drafting on the Publication of the Draft-Codes' in 'Letter No 75/131 from René Guyon to Chao Phraya Abhai Raja' (7 March 1925).

simplified version of the BGB of 1900 in both content and structure³ and, second, he thought that the successful establishment of the Minpō resulted from the copying method. What did lead Plod into believing this? There are two answers to this question. First, the Japanese method of and success in making a civil code, according to Plod, was brought to his attention by John, first Viscount Simon, when he studied law in England.⁴ Second, Plod was misled by De Becker's *Annotated Civil Code of Japan* of 1909. In copying Japanese provisions and understanding conceptions of Japanese civil law, Plod and the Thai draftsmen appear to have relied solely on De Becker's two books, *Annotated Civil Code of Japan* as the source of English translation of Japanese provisions and *The Principles and Practice of the Civil Code of Japan* of 1921 as a source of commentary on the Minpō. The information in the *Annotated Civil Code of Japan* is misleading in two ways. First, De Becker added a list of sources following the English translation of each Japanese provision which apparently had a connection with the Japanese rule in question. His style of referencing led Plod to believe that the annotations were produced by the Japanese draftsmen.⁵ This misunderstanding, however, had a positive effect; it inspired the draftsmen of the Code of 1925 to adopt De Becker's referencing method; they wrote down the model provisions which they copied in the English draft of each Thai provision. This is commonly known as 'Plod's List of References'.⁶ Second, the BGB of 1900 was the only foreign law to which De Becker referred in the second volume of his *Annotated Civil Code of Japan*, dealing with the Japanese Articles 399 to 724.⁷ It seems likely that this misleading information was the most important explanation for why Plod believed that the Minpō was a copy of the BGB.

This thesis has demonstrated that Plod was incorrect about the reception of German law in the drafting of the Minpō. Comparative lawyers should be reluctant to conclude that the Japanese simply copied the BGB of 1900 or any foreign code if they examine the drafting process of the Minpō thoroughly and take contextual factors of legal change in Japan at the time of codification into consideration. When comparing the nature of the discussion of the draftsmen of the Thai Code with those who worked on the Japanese Code, it is reasonable to think of the former as a

³ See ch 5, 1.2.3 'The tracing of De Becker's *Annotated Civil Code of Japan* and examining Plod's perception of the reception of German law in Japan' p 159 above.

⁴ See p 95 above.

⁵ Manavarajasevi, *Interviews* 9, 23.

⁶ See Phraya Manavarajasevi, อุทธรณ์สำหรับประมวลกฎหมายแพ่งและพาณิชย์บรรพ 1-2 ฉบับกรรมาญกฎหมายและที่มาของกฎหมายในประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-5 (Department of Legislative Drafting's Instances of Books I and II of the Civil and Commercial Code and Sources of the Provisions of Books I, II, II, IV, and V of the Civil and Commercial Code) (Bangkok University 1990).

⁷ JE de Becker, *Annotated Civil Code of Japan*, vol 2 (Butterworth 1909) 6–285.

product of the copying method and the latter a product of comparative jurisprudence. While the draftsmen of the Code of 1925 discussed which English translation should be copied, the Japanese draftsmen had to explain to the examination committee what principle underpinned the draft of each provision. Furthermore, the Minpō of 1898 emerged from hostility between English-law-oriented and French-law-oriented schools and its draft went through a parliamentary processes. This meant that the draftsmen had to forge a compromise, incorporate national customs and avoid blindly copying foreign law: the accusation of the last of these in part ended the Minpō of 1890.⁸ The anatomy of Article 414 of the Minpō illustrates that it was a mixture of foreign legal concepts with a predominance of French influence rather than a mere copy of any foreign text. In drafting Article 415 French and German legal concepts were mixed to the extent that it is not easy to determine whether this Japanese provision still maintains a French or German character.⁹

In this thesis it was also demonstrated that Plod uncritically relied on the information provided by De Becker's *Annotated Civil Code of Japan*. The two drafts of the BGB of 1900 were not the only foreign legal material that the Japanese draftsmen consulted. Despite the fact that in examining the drafts of the Japanese Articles 414 and 415, Hozumi provided the draft examiners with a long list of sources that he 'claimed' to consult neither the draftsmen nor the examiners officially confirmed that they were 'actually' adopted.¹⁰ De Becker neither claimed that the references contained in his book were produced by the Japanese draftsmen nor explained clearly why such references were included and he drew attention to only one foreign statute. Any Japanese provision linked with BGB rules in his book must therefore be verified with the help of proper comparative and historical methods.

While it is certain that Plod misunderstood the reception of German law in Japan and the foreign influence over the drafting of the Minpō, there is no definite proof that his misunderstanding about the Japanese method was shared by the other members of the drafting committee. However, the fact that the Thai committee members' adherence to the BGB and the Minpō indicates that they inclined towards Plod's belief that both laws were closely related. Only on rare occasions, did the

⁸ Kenzo Takayanagi, 'Occidental Legal Ideas in Japan: Their Reception and Influence' (1930) 3 *Pacific Affairs* 740, 745; Yoshiyuki Noda, *Introduction to Japanese Law* (Anthony H Angelo tr, University of Tokyo Press 1976) 47; Byron Marshall, 'Professors and Politics: The Meiji Academic Elite' (1977) 3 *JJS* 71, 83.

⁹ See ch 5, 2.1 'An anatomy of Articles 414 and 415 of the Minpō of 1898' 163.

¹⁰ See pp 161-63 above.

Thai draftsmen adopt provisions of the *Code civil*.¹¹ Had they known that the Minpō was influenced by both German and French law equally,¹² they may have been reluctant to adopt the Japanese provisions. In 1933, Boonchoi, one of the Thai draftsmen, made a comparative study of the provisions of Book II and explained that each of them bears similarities to a variety of foreign rules,¹³ some of which were not mentioned in the list of sources of the drafts. This did not mean that Boonchoi knew the true nature of the reception of German law in Japan at the time of the drafting of the Code of 1925. Had he known this truth in 1925, he may have brought it to Chitr and Plod's attention. In reality, during the drafting process, Boonchoi usually agreed with the other two Thai draftsmen. Even at the time of the publication of this commentary, it was not certain whether Boonchoi was already aware of the complexity of the reception of foreign private law in Japan. This is because his 1933 book only aimed at showing theoretical similarities between Thai and foreign provisions and did not engage with examining the origin of the Code of 1925. All these facts point to the conclusion either that during the drafting of the Code of 1925 the Thai draftsmen shared Plod's view that the Minpō was practically a copy of the BGB or that the very mixed nature of the Minpō was unknown to them. This is not surprising since the tracing of foreign influences in their civil code only began to generate interest among Japanese legal scholars from the 1960s.¹⁴

Specific performance: an example

The examination of the drafting of specific performance as the case study shows that there was an absence of theoretical explanation for the drafting of three essential rules of the Code of 1925 concerning specific performance, namely Articles 194, 213, and 215. Article 194 was copied from Chung Hui Wang's English translation of s 241 BGB (1900) verbatim. Articles 213 and 215, concerning the enforcement of performance and the right to damages in case of non-performance, were copied from De Becker's English translation of Articles 414 and 415 of the Minpō. It is worth noting that in the Minpō there is no provision similar to s 241 BGB. The

¹¹ See ch 3, 2.3 'An overview of the drafting process' p 117 above.

¹² Kenjiro Ume's Speech at French Civil Code Centenary Celebrations in 1904 at the Faculty of Law of the Imperial University of Tokyo quoted in Noda, *Introduction to Japanese Law* 52.

¹³ Phraya Debvitoon Pahoolsarutabordi, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1-2 มาตรา 1 ถึง 240* (Commentary on Articles 1 to 240 of Books I and II of the Civil and Commercial Code) (Bar Council of Thailand 1933).

¹⁴ Taro Kogayu, 'French Law Research in the Study of Civil Law in Japan' in Zentarō Kitagawa and Karl Riesenhuber (eds), *The Identity of German and Japanese Civil Law in Comparative Perspectives* (De Gruyter Recht 2007) 92.

Japanese Article 414 is the principal provision dealing with compulsory performance or specific performance. By contrast, the BGB of 1900, does not contain a provision dealing with how to enforce performance like the Japanese Article 414. For German lawyers this issue falls within the scope of procedural law.¹⁵

The minutes of the drafting committee's meetings show that Articles 194, 213, and 215 were drafted uncritically. In the drafting of Articles 194 and 215, there was not any discussion over their conceptual foundation or clear intellectual motive for copying s 241 BGB and Articles 415 of the Minpō respectively. The Japanese Article 414 was borrowed for the making of Article 213 simply because its wording was similar to that of Articles 331 to 334 of the old Civil and Commercial Code of 1923 ('Code of 1923').¹⁶ The Thai draftsmen needed a good definition of the term 'obligations' and s 241 BGB appeared to suit their needs well. They, however, failed to take account of the underlying principle of this provision, ie how German lawyers understood it and how it connected to other relevant German provisions. The function of Article 194 may therefore be understood as narrowly as the letter of the law presents. Similarly, the reason for adopting The Japanese Article 414 in drafting Article 213 that its wording was similar to that of a number of provisions of the Code of 1923 does not suggest that this Thai rule of specific performance was scientifically made. The drafting of Article 215 is, however, unknown. There is no clue as to when and by whom this article was introduced.

The question remains as to why the draftsmen adopted these foreign rules so readily. There are a few explanations for this, but the most important one appears to be that they held the broad view that Japanese civil law was a modified version of German law¹⁷ and De Becker's *Annotated Civil Code of Japan* was a trustworthy source of the Japanese provisions.¹⁸ For the Thai draftsmen, copying from the Minpō was not different from copying from the BGB. Plod viewed Japanese rules as digested German rules.¹⁹ The best illustration can be seen from the minutes of the meeting of the draftsmen on 27 August 1925. Relying on the second volume of the *Annotated Civil Code of Japan*, Plod was misled into believing that the Japanese

¹⁵ Florian Faust and Volker Wiese, 'Specific Performance: A German Perspective' in JM Smits and others (eds), *Specific Performance in Contract Law: National and Other Perspectives* (Intersentia 2008) 50.

¹⁶ National Archive of Thailand, Office of the Council of State Doc No 3(1) Books 5(1)(2), 'รายงานการประชุมกรรมการร่างกฎหมาย (The Minutes of the Meetings of the Committee of Legislation)' (3 March - 26 October 1925). The Minutes of the Meetings of the Committee of Legislation are, hereinafter, referred as 'Meeting Minutes'.

¹⁷ Manavarajasevi, *Interviews* 4, 13, 23, 42.

¹⁸ *ibid* 9.

¹⁹ *ibid* 4, 42.

Article 414 was modelled on ss 249 and 251 BGB (1900). This is illustrated by his proposal to change a term in the texts of the original draft of Article 213 to include 'restitution in kind' in accordance with ss 249 and 251 BGB. The other draftsmen readily approved his proposal without any doubt about whether the Japanese Article 414 was really founded on ss 249 and 251 BGB and how 'restitution in kind' was related to 'compulsory performance'.²⁰ It is not surprising if the uncritically copying of foreign rules and misconceptions about their origin may have had some effects on later generations' understanding of the rules adopted.

Effects of the reception

It was illustrated in Chapter 6 that the provisions of the Code of 1925 concerning non-performance and remedies for non-performance were mainly copied from the English translation of a number of provisions of the BGB and the Minpō. The reason why some were modelled on Japanese law while the others on German law is simple: the Thai draftsmen chose between these two legal systems mainly on linguistic grounds by opting for the provision which was written more clearly. Other than Articles 213 and 215 and some provisions concerning rescission, all of the provisions concerning non-performance were copied from the BGB of 1900. Having provisions dealing with causes of non-performance, namely impossibility of performance, delayed performance and imperfect performance, and remedies for non-performance, specific performance, damages and rescission,²¹ Thai law seems to follow the German system of non-performance.

Although their adherence to the BGB in drafting the provisions concerning non-performance seems to suggest that the draftsmen of the Code of 1925 intended to base the Thai system of non-performance on German law, their adoption of the copying method deprived them of the chance to discuss the theoretical basis of the relevant provisions. This has some significant effects on the way Thai scholars and lawyers have understood the concept of specific performance afterwards. While the Japanese choose to systematise and explain its rules of non-performance and remedies for non-performance mainly according with German law, the academic interpretation of the borrowed rules of the same area of law in Thailand is disoriented and reflects diversity of legal education backgrounds among the

²⁰ 'Meeting Minutes' (27 August 1925) 3.

²¹ See Table 6-3, pp 183-85 above.

interpreters as well as their occasional disregard of historical and comparative approaches to researching the relevant rules.

The existence of Articles 213 and 215 in the system of non-performance makes it difficult to identify the character of specific performance in Thai law because these two provisions are mainly French in nature while the other provisions of non-performance were copied from German law. This complexity leads to some undesirable results.²² First, the concept of specific performance has been explained and understood more within the scope of procedural law than of substantive law. Despite the fact that Thai scholars usually link Article 194, a copy of s 241 BGB, with Article 213, a copy of the Japanese Article 414, they perceive specific performance as the enforcement of claims rather than ‘a right conferred by substantive law’, the common interpretation of the concept of specific performance in Germany.²³ This is not surprising since the wording of Article 213 encourages interpreters to think that way and the model rule, Article 414, is similarly explained by Japanese scholars.²⁴ Furthermore, the phrase ‘when the nature of an obligation does not permit of compulsory performance’ always prompts interpreters to distinguish between obligations to do, not to do, and obligations to give to determine whether the creditor is entitled to the right to specific performance. The existence of Article 194, a copy of s 241 BGB, has not convinced Thai lawyers to adopt German jurisprudence to conceptualise specific performance fully perhaps because the German provision is perhaps too abstract. They mainly view Article 194 as the definition of the term ‘obligations’. This clearly illustrates that the borrowing of s 241 BGB did not bring its original meaning from German law to the new environment.

Second, most Thai academics readily accepted that specific performance was the first and primary remedy for non-performance, but they also maintained that in cases of non-performance the creditor can choose between the right to specific performance and the right to compensation for damage. This is contradictory. Giving the creditor the right to choose without justification means that specific performance is no longer the first and primary remedy for non-performance. There

²² The complexity of the system of remedies for non-performance in Thai law is reflected in Prachoom Chomchai’s statement on a choice of remedies for non-performance that ‘[t]he uncertainty of the codified law is...such that one cannot be sure whether the foregoing depicts a genuine option or simply a scenario or sequence of proceedings to be observed’. Prachoom Chomchai, ‘Introduction’ in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 80.

²³ Faust and Wiese, ‘Specific Performance’ 49.

²⁴ See ch 5, 2.2 ‘Germanisation’ of the Japanese concept of non-performance and remedies for non-performance’ p 172 above.

has been an absence of theoretical explanations in Thai literature on how the primacy of specific performance can coexist with the creditor's right to choose remedies freely in case of non-performance. Sophon Rattanakorn, an eminent expert on the Thai law of obligations, is the only writer who confirms that compensation for damage can be both an alternative remedy and a supplementary remedy of specific performance.²⁵ However, Sophon, who insisted on the principle of the primacy of specific performance, did not clarify how the primacy of specific performance was still upheld where the creditor had the right to choose between remedies.

The problem of the Thai concept of specific performance is not the question of choosing the most appropriate foreign theory to explain the principle of the primacy of specific performance but the difficulty in justifying the principle with the theory. It is unclear whether this difficulty is the result of the copying method used by the draftsmen of the Code of 1925 or the result of the approach which the interpreters adopted to interpret the rules. Although both are plausible causes, the former is, in my opinion, more convincing due to its objectivity; the wordings of Articles 213 and 215 seem to bar the interpreter from defending the principle of the primacy of specific performance logically. Specific performance cannot be the primary remedy for non-performance when the wording of Article 215 suggests that damages are always permitted where the debtor does not effect the performance.²⁶ This universal availability of damages in case of non-performance is a result of the blind copying of De Becker's English translation of the Japanese Article 415.

The principle of the primacy of specific performance does not necessarily mean that specific performance must always be chosen before the other remedies in case of non-performance. In German law, where the primacy of specific performance is 'axiomatic',²⁷ there are exceptional situations where the creditor can claim damages instead of performance and German lawyers make it clear when performance and damages coexist. Despite this, specific performance is still

²⁵ Sophon Rattanakorn, *คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยหนี้: บทเบ็ดเสร็จทั่วไป* (Commentary on the Law of Obligations of the Civil and Commercial Code: General Provisions) (10th edn, Nitibannakarn 2010) 150.

²⁶ Code of 1925, art 215 'When the debtor does not perform the obligation in accordance with the true intent and purpose of the same, the creditor may claim compensation for any damage caused there by'. Office of the Council of State, Doc No 79,

'การตรวจแก้ร่างประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 และ บรรพ 2 (The Book of the Revised Drafts)' (1925) 109.

²⁷ K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 472.

regarded as the primary remedy for non-performance.²⁸ By contrast, there is no systematic theoretical explanation of the principle of the primacy of performance and the availability of each remedy for non performance, ie when damages instead of performance and damages in addition to performance are available. The problem of this unclear relationship between contractual remedies in Thai law is well illustrated by the Supreme Court Decision No 2625/2551 BE (2008 CE) where the court rejected the plaintiff's claim for damages instead of performance on the grounds that the performance was still possible despite the fact that the contract had been rescinded before the case was brought before it.²⁹

The adoption of the Japanese Article 415 does not only create confusion over the relationship between specific performance and damages in the legal systems where specific performance is regarded as the primary remedy for non-performance, it also undermines the principle of fault. Either intentionally or accidentally the Japanese draftsmen did not incorporate the principle of fault into the text of Article 415.³⁰ Literally interpreted, this provision means that the debtor can be liable even if he is not responsible for his failure to perform the obligation. This gap was later filled by the Japanese court which held that, in case of delayed performance, the debtor's fault was a prerequisite for his liability.³¹ The draftsmen of the Thai Code of 1925 were unfortunately unaware of this problem and the Japanese judgement at the time of codification. The adoption of the Article 415 proves to be one of the most detrimental effects of the reception of foreign laws of obligations in Thailand. This is because Article 215, a copy of the Japanese Article 415, is contrary to Articles 205, a copy of s 285 BGB, which states that 'the debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not responsible'.³² The same question arises whether in Thai law the debtor is still liable for compensation for damage where he is not responsible for the cause of his failure to perform the obligation. In one of the most popular Thai texts on the law of obligations, originally written by Jeed Setthabutr but later edited by Daraporn Thirawat, Daraporn added her opinion to the original commentary on Article 205

²⁸ See also Dagmar Coester-Waltjen, 'The New Approach to Breach of Contract in German Law' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 135-56.

²⁹ Supreme Court Decision No 2625/2551 BE.

³⁰ Akira Kamo, 'Crystallization, Unification, or Differentiation? The Japanese Civil Code (Law of Obligations) Reform Commission and Basic Reform Policy (Draft Proposals)' (2010) 24 CJAL 171, 194.

³¹ Judgement of the Supreme Tribunal, 22 November 1922, Minroku 27-1978 cited in Hiroshi Oda, *Japanese Law* (3rd edn, OUP 2009) 138.

³² Chung Hui Wang, *The German Civil Code: Translated and Annotated* (Stevens and Sons 1907) 65; 'Book of the Revised Drafts' 107.

that although in case of delayed performance, the debtor cannot be put into default because he has a legitimate excuse under Article 205, by virtue of Article 215, he is still responsible for damages he caused and the creditor has the right to claim compensation for damage.³³ This interpretation clearly undermines the principle of fault and contradicts Article 205.

Article 215 can also be potentially problematic in case of delay if it is applied without the principle of fault. Since the draftsmen of the Code of 1925 copied Wang's English translation of s 284 BGB almost verbatim to formulate Article 204,³⁴ Thai civil law received the principle of notice of default (*Mahnung*). Although s 326 BGB (the principle of giving a period of grace (*Nachfrist*)) was not adopted Thai writers and courts interpret Article 204 to include *Nachfrist*. It is worth nothing that giving the creditor a second chance is also common in French law.³⁵ If Article 215 is interpreted literally as Daraporn did, the debtor's failure to perform his duty always gives rise to the creditor's claim for damages no matter whether the debtor is answerable to such failure (Article 205) and without the debtor being given a notice of warning and an additional period of time to perform (Article 204). This interpretation clearly nullifies the effect of Article 204 of the Code of 1925.

It is ironic that the Thai draftsmen who were critical of French law uncritically adopted two Japanese provisions which were largely based on French legal concepts to establish Articles 213 and 215. Their use of the copying method for drafting the Thai rules on specific performance has left a legacy of theoretical disorientation: while many leading Thai jurists have German law in mind, their interpretation points the way towards French law. The position of the current system of remedies for non-performance, especially specific performance, seems to be ambiguous and unfortunate. The time is ripe for Thai academics and lawyers to explore the possibilities of reforming not only the system of specific performance but also the entire system of the law of obligations in the Code of 1925 before it reaches its century in 2025.

³³ Jeed Setthabutr, หลักกฎหมายแพ่งลักษณะหนี้ (The Principles of the Law of Obligations) (20th edn, Thammasat University Faculty of Law 2011) 75–76. To compare Daraporn's edition with her predecessor's see Jeed Setthabutr, หลักกฎหมายแพ่งลักษณะนิติกรรมและหนี้ (The Principles of the Law of Juristic Acts and Obligations) (Chitti Tingsabadh (ed), 4th edn, Thammasat University Faculty of Law 1983) 418–19.

³⁴ See Table 6 - 3, p 183 above.

³⁵ *Code civil* art 1139. See Marcel Planiol, *Treatise on the Civil Law*, vol 2:1 (Louisiana State Law Institute tr, St Paul 1959) 101; GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Clarendon 1988) 132–33; Hugh Beale and others, *Cases, Materials and Text on Contract Law* (2nd edn, Hart Publishing 2010) 973.

2. WHAT DOES THE CASE STUDY TELL US?

The research on the drafting of the rules concerning specific performance in Thailand provides insights not only into the development of the rules and the concept in question but the pattern of legal change of the entire Code of 1925. This case study thoroughly examined the general method which the draftsmen adopted in drafting Books I and II of the Code of 1925. However, the case study shows that some problems have resulted from the use of the copying method. Since almost all of the rules of the Code of 1925 were products of copying, one can reasonably assume that similar problems exist with other rules and concepts, especially the rules and concepts which were copied from the Minpō of 1898.

Legal transplants and the development of Thai private law

On the surface, the making of the Code of 1925 seems to be an excellent example of Alan Watson's theory of legal transplants.³⁶ It matches many of his observations on legal change and does so better even than the reception of foreign civil law in Japan, one of his typical examples. Watson suggested that successful legal borrowing does not require 'a systematic knowledge of the law'³⁷ and that 'the transplanting of legal rules is socially easy...[they] move easily and are accepted into the system without too great difficulty'.³⁸ This characterisation of legal change can be identified in the modernisation of Thai private law in 1925. While the Japanese took great interest when employing comparative methods in establishing their original code of law, the Thai draftsmen devoted their attention to copying the wording of foreign rules. Consequently, they neglected the historical and doctrinal foundations of the rules. The draftsmen of the Code of 1925 treated legal rules as if they were a substance which could be picked up and implanted very easily. It is clear that they understood the rules adopted mainly from their literal meaning and as a result some misconceptions occurred. It is hard to believe that a group of five draftsmen, three of whom were busy Thai officials who held top positions in judiciary and in government departments, spent only approximately seven months drafting the first

³⁶ See Andrew Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nodic Din'' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 213.

³⁷ Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 79.

³⁸ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, UGA Press 1993) 95–96, 99.

two books of the Code of 1925. However, with the help of the copy-and-paste method, codification happened quickly.

The relevance of internal and external factors

The Code of 1925 was speedily made within seven months by a handful of people, namely five draftsmen, members of the High Revising Committee and the monarch. This appears to support Watson's proposition that 'legal development by transplanting derives from the expertise of the lawyers who know the foreign rule rather than from the common consciousness of society'.³⁹ However, taking account of the social and political contexts of Thailand between the late nineteenth and early twentieth centuries, legal change during that period can be better understood. The country came under intense external pressure, colonisation threats and increasing abuse of consular jurisdictions. It concurrently faced an internal challenge, the realisation that its legal system was falling into decay. A reform of the justice system became a principal condition for the unfair treaties to be relaxed or abolished. Plod accepted that the government's strong desire to end extraterritoriality was the reason why codification had to be accelerated.⁴⁰ The question remains as to how long it would have taken the Siamese government to modernise its law without this external pressure. It is unconvincing that the Thai's self consciousness about their own defective systems alone could be the driving force for legal change since that their realisation sprang up only after the arrival of expansionism in the nineteenth centuries.

The absence of 'the common consciousness of society' was apparent,⁴¹ and the modernisation of Thai private law was in the hands of a handful of professional elites and the ruling class. Watson may be right in suggesting that the practical pressure, ie economic, social and political pressure, must be also directed against the

³⁹ Alan Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313, 315. See also Alan Watson, *Society and Legal Change* (2nd edn, TU Press 2001) 8; Alan Watson, *Legal Origins and Legal Change* (Hambledon Press 1991) 101–02.

⁴⁰ Phraya Manavarajasevi, 'คำรำลึกของพระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา) (Recollection of Phraya Manavarajasevi)' in The Council of State of Thailand (ed), *ครบรอบ 48 ปี 2524 สำนักงานคณะกรรมการกฤษฎีกา* (48 Years of the Council of State (BE 2524)) (Council of State of Thailand 1981) 5.

⁴¹ Aubrey L Diamond opines that '[i]f the laws of one country can be adopted by another, it becomes difficult to argue that, for the adopting country at any rate, law arises from the common consciousness of the people'. Aubrey L Diamond, 'Review of *Society and Legal Change* by Alan Watson' (1980) 96 LQR 303, 306.

culture of lawmakers for law to be changed.⁴² This is because it is undeniable that legislators always have a role to play in a change of law. However, the experience of Thailand cannot be counted as definite proof that the lawmakers are always the decisive factor for legal change. One must look into an essential characteristic of Thai society to understand why legal change and legislation did not interest the ordinary Thai people at the time. As Sarasin Viraphol observed that paternalism formed the basis of traditional Thai society,⁴³ the people were accustomed to being controlled by the ruler. Under absolutism, ordinary Thai people were not usually given a role to play in politics. They were prohibited from acquiring statutes since access to law was restricted to the ruler and his officials. It is not until 1862 that King Mongkut allowed the printing and circulation of the Three-Seal Code.⁴⁴ These political and social conditions explained why legal change in Thailand was not a product of the common consciousness of society and why the Code of 1925 could be made easily by the will of the ruler. To understand why foreign private law was easily transplanted into the Thai legal system, one also needs to look at the system of Thai private law before modernisation. The Three-Seal Code shows that a contract constituted moral rather than legal obligations. The law did not clearly distinguish between civil and criminal disputes or between contracts and torts; they were all mixed. There was no evidence of commercial law.⁴⁵ As Andrew Huxley puts it, where the monarch had a monopoly on trade, political rather than legal tools were needed.⁴⁶ It is understandable that in the absence of a developed system of private law, superior foreign civil and commercial law was readily accepted and, of course, there were no issues of conflicts between traditional Thai private law and the foreign private rules received. This verifies the observations of some legal sociologists, notably Roger Cotterrell, who submits that a transplantation of instrumental laws, especially contract and commercial law, is relatively easy because of their 'tie to economic interests rather than national customs or sentiments'.⁴⁷ To conclude in Watson's terms that legal change in Thailand in 1925 was socially easy may be right, but this specific example does not necessarily prove

⁴² Watson, *Legal Origins* 101–02; Alan Watson, *The Evolution of Law* (Blackwell 1985) 118–19.

⁴³ Sarasin Viraphol, 'Law in Traditional Siam and China: a Comparative Study' (1977) 65 JSS 81, 83–93.

⁴⁴ David K Wyatt, *Thailand: A Short History* (2nd edn, YUP 2004) 173; Andrew Huxley, 'Introduction' in Andrew Huxley (ed), *Thai Law, Buddhist Law: Essays on the Legal History of Thailand, Laos and Burma* (White Orchid 1996) 10.

⁴⁵ See ch 1, 1.3.2 'Traditional Thai private law' pp 61–63 above.

⁴⁶ Huxley, 'Introduction' 25.

⁴⁷ Roger Cotterrell, 'Is There a Logic of Legal Transplants?' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart Publishing 2001) 81–82.

that Watson's notion is universally true. Its validity can be questioned when it comes to legal change in democraticised Thai society.

Legal irritants and success of the reception

The making of the Code of 1925 may support Watson's view that legal change does not derive from 'the common consciousness of society', but this thesis questions whether legal transplants, as Watson contended, are so easy to accomplish that a systematic knowledge of foreign law is not needed to implement them. If law can be borrowed without a systematic knowledge of it, do we really need lawyers to undertake legal reforms? If legal change can occur simply by copying legal ideas or legal texts, as illustrated by the making of the Code of 1925, one can argue that there is no need for lawyers at all; any one with a good command of the foreign language in which the law books of the borrowed system are published may be tasked with copying the foreign legal texts.⁴⁸

Because Watson placed excessive emphasis on the survival of the received law but too little on how the received law has operated in its new environment, his legal transplantation model is easy and unproblematic. Studies of the reception of rules concerning specific performance in Thailand have, however, shown that a legal transplant means something more than a mere copying of legal ideas or texts and that it potentially causes theoretical misconception and disorientation. From a doctrinal perspective, the research findings challenge at least two postulates of Watson's theory of legal transplants: first the recipient system does not require 'a systematic knowledge of the law'⁴⁹ and second the proposition that '[a] successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system'.⁵⁰

The hasty process of drafting the Code of 1925 shows that the draftsmen picked up the model rules and arranged the Thai provisions based on the outlines of the Japanese and German Civil Codes, which were deemed well-structured. Thus

⁴⁸ Watson's claim that a successful transplant does not require 'a systematic knowledge of the law' does not convince Eric Stein, who 'find it somewhat difficult to conjure up an image of a law reformer on a *tour d'horizon* of foreign legal systems, plucking ideas from 'black letter' rules in complete ignorance of how such rules operate as 'living law' and where they fit into the legal system' Eric Stein, 'Uses, Misuses – and Nonuses of Comparative Law' (1977-78) 72 Nw U L Rev 198, 209.

⁴⁹ Watson, 'Legal Transplants and Law Reform' 79.

⁵⁰ Watson, *Legal Transplants* 27.

one may claim that by copying their structures the Thai code was automatically systematised. This may be broadly true. However, the drafting process neglected the systematic conceptual basis of the rules adopted since the draftsmen placed emphasis on the arrangements of the words rather than on their underlying principles. The rules in the BGB are not completely independent from each other. Several of them are systematically connected and represent the same concept. This was illustrated by the German principle of the primacy of specific performance where provisions concerning delayed performance, damages, and rescission confirmed that a debtor should be given a chance to perform his obligations before the creditor could seek other remedies. Moreover, one concept is not always independent from another. A systematic knowledge of the concept of law therefore helps with understanding how the relevant rules are theoretically linked under its purview.

If a concept is reflected in five separate provisions, an adoption of three out of the five provisions may result in the transfer of an incomplete concept. The incomplete German concepts of specific performance and non-performance which Thailand received from Germany and Japan have proven to be theoretically problematic in the understanding of the relevant rules. Thai lawyers did not understand the concept of specific performance in the same way as German and Japanese lawyers did despite a claim that the Thai system of performance follows German law.⁵¹ The meaning of the concept changed. It changed not when the law was put into effect but since the rules were adopted. Articles 414 and 415 of the Minpō were adopted to draft Articles 213 and 215 of the Code of 1925 respectively without any realisation that they were predominantly based on French law. In fact, Plod and most likely other Thai draftsmen naively believed they were of German origin.

In reality, the interpretations of Articles 213 and 215 have been more consistent with French than German Jurisprudence. It is not certain whether French jurisprudence has exerted considerable influence over this interpretation because of French characters apparently contained in the texts of Articles 213 and 215 or because of the interpreters who adhered to the French approach. This ambiguity resulted from lack of explanations in the Thai texts on the law of obligations about why French jurisprudence was adopted. However, considering the development of legal education in Thailand one may find the reason why the law of obligations in Thailand was mostly academically explained according to French law. From the

⁵¹ Rattanakorn, *Law of Obligations* 135.

establishment of Thammasat University in 1934, French law rivalled English law in Thai legal education. It later became the predominant foreign legal system, especially in private law, in Thailand. It is natural that those familiar with French law picked up French doctrines to interpret the provisions of the Code of 1925. Coincidentally, Articles 213 and 215 were of French heritage.

Taking account of Thailand's experience in the borrowing of the specific performance rules, Pierre Legrand's argument that the meaning of a rule is not entirely supplied by the rule itself but depends on the contexts of the place where it exists and the interpreter who applies it has some merit. However, Gunther Teubner may provide a clearer explanation for what has happened in Thailand. His theory of 'legal irritants' has challenged Watson's postulate that the received law will develop in the same way as it would have done in its parent system. The conclusion of this thesis favours the former for two reasons. First, from a doctrinal perspective, the law received is not the same as the one used as the model despite the fact that the latter was copied word for word. The Thai draftsmen, the first group of interpreters, did not understand the model rules as they were understood in their parent system. When they transplanted the rules into the Thai legal system they gave them new meanings. Second, the received rules have not developed in the same way as their models. They have been understood and interpreted in various ways, some relying on the information provided by the draftsmen and others on their most familiar foreign approaches.

It is not easy to determine whether the reception of foreign private law in Thailand in 1925 has been successful. The meaning of 'success' and criteria for assessing it are themselves subjective and controversial. It is understandable that one might readily add the making of the Code of 1925 to Watson's successful legal transplant list.⁵² If success of a reception is determined by the survival of the rules borrowed as Watson suggested,⁵³ since the Thai code has been in use and most of its provisions have remained untouched by subsequent reforms since its promulgation in 1925, one can conclude that the reception of foreign private law has been successful. However, if success of the modernisation of Thai private law in 1925 is determined by the achievement of the goals set by the draftsmen to make a systematic and coherent code based on the BGB, the case study of specific

⁵² Andrew Harding submits that 'law in South East Asia has evolved out of legal transplantation, which has, on the whole, been successful if judged by the criterion of whether the law has stuck or unstuck' (Watson's notion of successful transplants). Harding, 'Comparative Law and Legal Transplantation in South East Asia' 213.

⁵³ See Watson, 'Legal Transplants and Law Reform' 82-83; Watson, *Legal Transplants* 20; Alan Watson, *Society and Legal Change* 98.

performance suggests a negative answer. Although the problems of specific performance resulting from the method adopted in the making of the Code of 1925 cannot be generalised, this case study should alarm Thai lawyers that there may be some similar problems elsewhere in the Code resulting from the same cause.

The use of comparative law in Thailand

From the process of receiving foreign private law to the process of interpreting the law received in Thailand, it has been discovered that there have always been problems with the use of comparative law.⁵⁴ If there were major failures in the making of the Code of 1925, an absence of a proper use of comparative law must be one of them. Plod himself admitted that the Code of 1925 was made mostly by copying and the draftsmen's claim that it was a product of comparative law was overstated.⁵⁵ It was unfortunate that during the time of codification comparative law was only a fledgling legal science. It did not enjoy the international academic attention it does today. However, this does not excuse ignoring careful comparisons, which means not only a careful scrutiny of the underlying principles of the rules to be adopted and their functions but also means being aware of their historical development. This thesis affirms that legal history is indispensable for those who make use of comparative law for the sake of borrowing. It proves that the flaws in the borrowing of foreign rules were caused by uncritically copying and by being unaware of misleading information in secondary sources. The problems therefore resulted from an absence of a proper use of comparative and historical methods. Had the draftsmen of the Code of 1925 traced the origin of the Japanese rules adopted they would have discovered that some of them did not derive from the BGB. Had they had a systematic knowledge of German private law they would have found that there is a distinction between the German and French concepts of

⁵⁴ Andrew Harding viewed the problem of the use of comparative law as a common problem in Southeast Asia. According to Harding, '[t]he fundamental conceptual problem confronting those working on law in South East Asia is that the conventions of comparative law are often inadequate to convey South East Asian legal reality; what comparative law therefore lacks...is a suitably flexible and sophisticated grammar of the discourse'. Harding, 'Comparative Law and Legal Transplantation in South East Asia' 203.

⁵⁵ Manavarajasevi, 'Recollection of Phraya Manavarajasevi' 5. However, relying on Plod's List of Resources, Naoyuki Isogawa was under the impression that 'TCCC [Thai Civil and Commercial Code] can more accurately than JCC [Japanese Civil Code] be characterized as the genuine fruits of comparative jurisprudence'. Naoyuki Isogawa, 'The Japanese Civil Code in the World Legal Systems: Toward a Comparative Study of the Asian Civil Law' in Prachoom Chomchai (ed), *Development of Legal Systems in Asia: Experiences of Japan and Thailand* (Thammasat University 1998) 165.

specific performance. One can reasonably argue that the draftsmen could not always foresee the future theoretical and practical problems of the law they made and that interpretation varies depending on the interpreter's conception about the rule. It can hardly be denied that the draftsmen's sufficient knowledge of law would have prevented some potential problems which might arise from conflicting concepts.

Unfortunately, when tracing of the origin of the Code of 1925, Thai academic and researchers usually consult 'Plod's List of References'.⁵⁶ As discovered in this thesis, this source is partially misleading especially concerning provisions of the Minpō because they were influenced by De Becker's *Annotated Civil Code of Japan*. While the Japanese have realised that some 'Germanised' Japanese provisions were not of German origin since the 1960s, in Thailand there has been a lack of research on the validity of 'Plod's List of References'. If one needs comparison as a tool for propounding his native legal concepts, one also needs to use legal history.⁵⁷ However, John W Cairns cautions that '[c]omparison may be useful in achieving better historical understanding but it can also hold dangers, depending on how it is used'.⁵⁸ It is hard to understand how Thai academics could compare Thai private law with foreign private law without even knowing the true identity, position, and origin of their own law. With the help of a historical method, they will be able to discover the true origin and nature of it and may be able to determine which approach they will adopt to interpret the law.

Reassessments of the Code of 1925

This thesis has paved the way for a thorough reassessment of the Code of 1925. On a large scale, the law commission of Thailand and relevant organisations need to

⁵⁶ See an example of a misunderstanding arising from reliance on Plod's List of References in n 55 above.

⁵⁷ See Frederic William Maitland, 'Why the History of English Law Is Not Written' in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland*, vol 1 (CUP 1911) 488; Frederick Pollock, 'The History of Comparative Jurisprudence' (1903) 5 JSCL 74, 75; Harold Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (CUP 1946) 28–29; Watson, *Legal Transplants* 6; James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 772; David Johnston, 'Roman Law, Comparative Law and Legal History' (1999) 3 ZEuP 560, 561–64; William Ewald, 'Legal History and Comparative Law' (1999) 3 ZEuP 553, 558–559; Zweigert and Kötz, *Introduction to Comparative Law* 8.

⁵⁸ For example, a comparative study of English and Scottish legal history, according to Cairns, is not always appropriate. John W Cairns, 'National, Transnational and European Legal Histories: Problems and Paradigms. A Scottish Perspective' [2012] 5 Clio@Themis 6 <http://www.cliothemis.com/IMG/pdf/TP_Cairns.pdf> accessed 15 November 2012.

examine the drafting process of the Code and the effects of the copying method. There are several important issues about the making of the Code of 1925 and success of the reception, for example translation⁵⁹ and economic effects of the reception, which cannot be thoroughly investigated in this thesis. This thesis, for example, raised a linguistic issue concerning the terms 'compensation for damage' and 'pecuniary damages' in Articles 213 and 215 which were slightly changed by the draftsmen when they were copied and were translated into Thai according with the alteration.⁶⁰ The change of the terms and the translation have affected Thai lawyers' understanding of the rules containing these two terms, especially in connection to delictual and contractual remedies. The issue of lack of a unified and sophisticated system of contractual remedies should also be considered seriously. The ambiguous relationship between specific performance and damages results in uncertainty as to the scope of these two remedies, ie when they are available and whether damages in lieu of performance and damages in addition to performance are distinguished. These concepts of contractual remedies should also be assessed from economic perspective, ie whether the current remedies are just and sufficient to the person who suffers loss.

The legal systems on which the Code of 1925 were based, namely the BGB, the Minpō and the French *Code civil*, have all been reformed or have attracted attempts to reform them, especially the system of remedies for non-performance. The Germans revised the BGB in 2002. The revision mainly concerned non-performance and remedies for non-performance. Specific performance was strengthened while other remedies, namely damages and rescission, were systematised. The German system of non-performance has changed from a system based on types of performance which revolved around impossibility of performance to a system based on remedies for non-performance.⁶¹ The Japanese detected some problems of the rules of the Minpō, especially the law of obligations, which arose from the adoption of various foreign laws and the concepts which were 'Germanised'.⁶² In 2009 the Japanese government responded to academic requests for a revision and

⁵⁹ In Japan, the problem of translation which arised from the reception of foreign law was discussed extensively. See eg Ichiro Kitamura, 'Problems of the Translation of Law in Japan' (1993) 23 Victoria U Wellington L Rev 143.

⁶⁰ See p 205 above.

⁶¹ Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 39–40; Andreas Heldrich and Gebhard Rehm, 'Modernisation of the German Law of Obligations: Harmonisation of Civil Law and Common Law in the Recent Reform of the German Civil Code' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 130.

⁶² See ch 5, 2.2 'Germanisation of the Japanese concept of non-performance and remedies for non-performance' p 172 above.

the Japanese Ministry of Justice set up a commission to consider a reform on the Code in relation to the law of obligations.⁶³ Although the work of the commission is still in progress, this movement shows the Japanese realisation of the defects resulting from the reception of foreign law. Since many provisions of the Thai law of obligations were copied from Japanese rules, the Japanese reform project may provide useful lessons for the Thai to learn. A French academic project on a proposal for reform of the law of obligations⁶⁴ might also be a resource for learning. The unclear French position of specific performance, a legacy of the adoption of two conflicting concepts of performance, namely those of Pothier and Domat, has polarised academic views on the primacy of specific performance.⁶⁵ The proposal offers a reinterpretation of current Article 1142 of the *Code civil* and proposes a new provision, proposed Article 1154, to replace it. This proposed provision reinterprets Article 1142 to strengthen the principle of the primacy of specific performance.⁶⁶

On a small scale, the Thai writers on the law of obligations need to examine whether any of their conceptions were based on misleading information from De Becker's *Annotated Civil Code of Japan*. Any misunderstandings should be corrected. To expound on the Code of 1925 they must pay more attention to the historical development of individual rules to avoid being misled by secondary sources, such as that of De Becker. This can be achieved only with the help of proper comparative and historical methods.

⁶³ Kamo, 'Crystallization' 173–74. See also the web page of the Japanese Ministry of Justice's Reform of Civil Code <http://www.moj.go.jp/ENGLISH/ccr/CCR_00002.html> assessed 22 February 2013.

⁶⁴ See John Cartwright, Stefan Vogenauer, and Simon Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription* (Hart Publishing 2009).

⁶⁵ See pp 130–33 above. See also Yves-Marie Laithier, 'Comparative Reflections on the French Law of Remedies for Breach of Contract' in Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005) 103–22.

⁶⁶ Art 1154: 'If possible an obligation to do is to be performed in kind.

Its performance may be ordered by a court either on pain of a monetary penalty or of some other means of constraint, unless the subject-matter of the obligation has a clearly personal character.

In no case may performance be obtained by recourse to any coercion which compromises a debtor's personal liberty or dignity.

In the absence of performance in kind, an obligation to do gives rise to damages' in John Cartwright and Simon Whittaker (tr), 'Proposals for Reform of the Law of Obligations and the Law of Prescription' 111 <<http://denning.law.ox.ac.uk/iecl/pdfs/Proposals%20for%20Reform%20of%20the%20Law%20of%20Obligations%20and%20the%20Law.pdf>> accessed 22 February 2013. See also Yves-Marie Laithier, 'The Enforcement of Contractual Obligations: A French Perspective' in John Cartwright and others (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription* (Hart Publishing 2009) 127.

If they are to reform the Code of 1925, Thai lawyers and lawmakers need to learn from the lessons of history. They may take Bentham's following note of caution into account to avoid the same mistakes:

The productions of one country are, in course of time, transplanted to another: and the course of cultivation, may, in consequence, be changed; but if any change is in consequence required in the laws, it arises from the blindness or indolence of the legislator of former times.⁶⁷

⁶⁷ Jeremy Bentham, 'Essay on the Influence of Time and Place in Matters of Legislation' in John Bowring (ed), *The Works of Jeremy Bentham*, vol 1 (Russell & Russell 1962) 189.

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